DOCUMENT RESUME

ED 231 594	RC 014 204
TITLE	Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act. Hearing before the Select Committee on Indian Affairs. United States Senate, Ninety-Seventh Congress, Second Session.
INSTITUTION	Congress of the U.S., Washington, D.C. Senate Select Committee on Indian Affairs.
PUB DATE	30 Jun 82
NOTE	514p.; Not available in paper copy due to small type of original document.
PUB TYPE	Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF02 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*American Indian Education; *American Indian Reservations; *Community Development; *Community Resources; *Economic Development; Elementary Education; Hearings; *Self Determination; Tribes
IDENTIFIERS	Congress 97th; Contract Schools; *Indian Self Determination Education Assistance Act

ABSTRACT

The purpose of the oversight hearing was to hear from administration and tribal witnesses on the implementation of the Indian Self-Determination and Education Assistance Act (Public Law 93-638), which was signed into law on January 4, 1975. The hearing focused on five concerns of the legislation: (1) the new draft regulations pending publication for comment which amend Bureau of Indian Affairs regulations implementing P.L. 93-638; (2) the method for determining the secretarial level of funding for a P.L. 93-638 contract in the first and subsequent years of operation; (3) the administrative, incremental, or indirect cost problems associated with 638 contracts and recommendations for necessary changes in the system to assure continued tribal desire to operate programs; and (4) the problems associated with the indirect cost rate and recommendations for necessary changes. Thirty-three representatives offering testimony to the hearing included spokespeople from: National Congress of American Indians; Department of Interior; Rock Point School, Arizona; Alamo Navajo School Board, New Mexico; Association of Contract Tribal Schools; Lake Superior Band of Chippewa Indians; Passamaquoddy Tribe; Fort Hall Business Council; Papago Tribe of Arizona; and Penobscot Nation. Written documentation submitted to the hearing is also attached. (ERB)

****
*   Reproductions supplied by EDRS are the best that can be made   *
*   from the original document.   *
****

ED231594

OVERSIGHT OF INDIRECT COSTS AND CONTRACT PROVISIONS OF THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

OVERSIGHT OF INDIRECT COSTS AND CONTRACT PROVISIONS OF THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

JUNE 30, 1982

WASHINGTON, D.C.

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.

☑ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

19-891 O

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1983

RC014204

00 2

SELECT COMMITTEE ON INDIAN AFFAIRS

WILLIAM S. COHEN, Maine, *Chairman*

BARRY GOLDWATER, Arizona
MARK ANDREWS, North Dakota
SLADE GORTON, Washington

JOHN MELCHER, Montana
DANIEL K. INOUYE, Hawaii
DENNIS DECONCINI, Arizona

TIMOTHY C. WOODCOCK, *Staff Director*

ED053124

CONTENTS

WITNESSES

Page
Andrade, Ronald P., executive director, National Congress of American Indians 114
  Prepared statement 117
Balsiger, Dick, Director, Office of Administration, Department of the Interior 2
Barney, Ben, Rock Point School, Rock Point, Ariz 242
Baron, Arnold, Office of the Inspector General, Department of the Interior 2
Berlin, William, executive director, Alamo Navajo School Board, Inc., Magdalena, N. Mex 272
  Prepared statement 274
Beuley, Bob, Office of the Inspector General, Department of the Interior 2
Bordeaux, Roger, executive director, Association of Contract Tribal Schools, St. Francis, S. Dak 239
Cadotte, Bill, tribal contracts officer, Lake Superior Band of Chippewa Indians 29
Dore, Cliv, lieutenant governor, Passamaquoddy Tribe, Pleasant Point Reservation, Perry, Maine 151
Edmo, Maxine, member, Education Committee, Fort Hall Business Council, Fort Hall, Idaho 93
  Prepared statement 98
Emmons, Barbara, director, early childhood program, Papago Tribe of Arizona 160
  Prepared statement 171
Exendine, Dr. Joseph N., Deputy Director, Indian Health Service, Department of the Interior 8
Francisco, Enos, Jr., vice chairman, Papago Tribe of Arizona 160
  Prepared statement 165
Funke, Howard, tribal attorney, Shoshone-Bannock Tribes of Fort Hall, Idaho 93
Hoffman, Bruce, Rock Point School, Rock Point, Ariz 270
Jim, George, president, Association of Navajo Community Controlled School Boards 235
  Prepared statement 235, 236
Kills Straight, Birgil, executive director, Little Wound School Board, Kyle, S. Dak 239
Kirkland, Johnnie, program analyst, Indian Health Service, Department of the Interior 8
Krenzke, Ted, Director, Office of Indian Services, Bureau of Indian Affairs 2
Little, Edward, executive assistant to the chairman, All Indian Pueblo Council, Albuquerque, N. Mex 108
Lovato, Delfin J., chairman, All Indian Pueblo Council, Albuquerque, N. Mex., prepared statement 110
Love, Tim, governor, Penobscot Nation, Indian Island, Old Town, Maine 120
  Prepared statement 122
McLaughlin, Robert W., special assistant to the tribal chairman, Standing Rock Sioux Tribe, Fort Yates, N. Dak 126
  Prepared statement 129
Moolenijzer, Jay, executive director, Black Mesa Community School, Rough Rock, Ariz 238
Moran, Joe, Director, Office of Contracts and Grants, Health Services Administration, Department of the Interior 8

0c. 4

Page

Ruiz, Rosita, treasurer, Papago Tribal Council, Sells, Ariz 160
  Prepared statement 167
Smith, Kenneth L., Assistant Secretary for Indian Affairs, Department of the Interior 2
  Prepared statement 4
Thayer, Gordon, chairman, governing board, Lac Courte Oreilles Band of Lake Superior Chippewas, Hayward, Wis 29
Tomah, Virginia, tribal council member and director of social services, Passamaquoddy Tribe, Pleasant Point Reservation, Perry, Maine 124
White Lightning, Allen, tribal council member, Standing Rock Sioux Tribe, Fort Yates, N. Dak 126
Wolfe, George, Director, Operations Division, Office of Procurement and Logistics, Office of the Assistant Secretary, Department of the Interior 8
Yazzie, Dorothy, school board member, Black Mesa Community School, Rough Rock, Ariz 237
Zion, Rosemary, assistant director, Navajo Division of Education, Window Rock, Ariz 135, 155
  Prepared statement 136

MATERIAL SUBMITTED FOR THE RECORD

Alamo Navajo School Board, Inc., prepared statement of Dr. William Berlin, executive director 274
Lac Courte Oreilles Tribal Government, briefing document outline 34
Papago Tribe of Arizona, prepared statements and related material 165
Rock Point Community School, prepared statement 244

APPENDIX

ADDITIONAL MATERIAL RECEIVED FOR THE RECORD

Letter from Rebecca Apple, dated August 10, 1982, to Senator Cohen 299
Letter from George Jim, Association of Navajo Community Controlled School Boards with enclosed resolutions; to Senator Cohen 300
Letter from S. Bobo Dean, Association on American Indian Affairs, Inc., with enclosed memorandum; to Jo Jo Hunt, staff attorney 303
Letter from Ronald G. Tedrow, CPA, McGladrey Hendrickson & Co.; to Robert Chasing Hawk, Cheyenne River Sioux Tribe 312
Letter from S. Bobo Dean, Association on American Indian Affairs, Inc., with enclosed statement; to Senator Cohen 318
Letter from Juanita L. Learned, of the Cheyenne and Arapaho Tribes of Oklahoma, with enclosed statement 333
Letter from the Borrego Pass School Board, Inc., George Jim, president; to Senator Cohen 336
Letter from S. Bobo Dean, Fried, Frank, Harris, Shriver & Kampelman, with enclosed statement; to Betty Jo Hunt, staff attorney 338
Letter from S. Bobo Dean, Fried, Frank, Harris, Shriver & Kampelman, with enclosed material relating to the Norton Sound Health Corp.; to Senator Cohen 375
Letter from Henry Brockie, Sr., president, Fort Belknap Community Council, with enclosed position paper; to Senator Melcher 408
Prepared testimony of the National Tribal Chairmen's Association 412
Prepared testimony of the Oglala Sioux Tribal Council 421
Letter from the Rock Point Community School, Jim L. Nih, president, with enclosed comments on the proposed regulation revisions; to Ken Smith, Assistant Secretary for Indian Affairs, Department of the Interior 425
Prepared testimony of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation 494
Letter from David W. Whitener, chairman, Squaxin Island Tribe, Shelton Wash.; to Senator Cohen 502
Letter from David M. Gipp, executive director, United Tribes Educational Technical Center, Bismarck, N. Dak., with enclosed statement; to Senator Cohen 504

OVERSIGHT OF INDIRECT COSTS AND CONTRACT PROVISIONS OF THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

JUNE 30, 1982

U.S. Senate,
Select Committee on Indian Affairs,
Washington, D.C.

The committee met, pursuant to notice, at 9:40 a.m., in room 5110, Dirksen Senate Office Building, Senator William S. Cohen (chairman) presiding.

Present: Senators Cohen and DeConcini.

Staff present: Timothy C. Woodcock, staff director; Peter S. Taylor, general counsel; and John Mulkey, staff professional.

Senator Cohen. The committee will come to order.

The purpose of the hearing today is to hear from administration and tribal witnesses on the implementation of the Indian Self-Determination and Education Assistance Act, Public Law 93-638.

The hearing will focus on the following: First, the new draft regulations pending publication for comment which amend Bureau of Indian Affairs regulations implementing Public Law 93-638; second, the method for determining the secretarial level of funding for a Public Law 93-638 contract in the first and subsequent years of operation; third, the administrative, incremental, or indirect cost problems associated with 638 contracts and recommendations for necessary changes in the system to assure continued tribal desire to operate programs; and fourth, the problems associated with the indirect cost rate and recommendations for necessary changes.

This hearing is the first oversight effort by this committee on the implementation of the act since the 95th Congress. The act was signed into law on January 4, 1975. The regulations were promulgated and the proposed amendments are the first changes in the original regulations.

I believe that this is one of the most important hearings this committee will hold during the 97th Congress. The issues involved relate to the success of the self-determination policy urged by previous Republican administrations which provided what I believe were, and remain to be, meaningful changes in Indian policy.

The committee is concerned about problems which have developed in the implementation of 638 which have been reported to the committee by tribal representatives and other interested parties. The committee is concerned with accounting problems which brought a tribe to the committee late last year to request the passage of legislation, which authorized the disbursement of tribal judgment funds to bail the tribe out of a situation of near financial collapse in part because of indirect cost problems. The committee is concerned with tribal employees working in a contracted program without a cost of living increase since the inception of the program several years ago.

We are sure that the administration witnesses have some good suggestions for addressing these concerns. We are particularly interested in Tribal suggestions as well for addressing these concerns. We look forward to hearing the views of the scheduled witnesses on these important issues.

Our first panel of witnesses will be the Honorable Kenneth Smith, Assistant Secretary of the Interior for Indian Affairs, and—Mr. Smith, please introduce those who are with you?

STATEMENT OF KENNETH L. SMITH, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY: TED KRENZKE, DIRECTOR, OFFICE OF INDIAN SERVICES, BUREAU OF INDIAN AFFAIRS; DICK BALSIGER, DIRECTOR, OFFICE OF ADMINISTRATION, DEPARTMENT OF THE INTERIOR; BOB BEULEY AND ARNOLD BARON, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF THE INTERIOR

Mr. SMITH. Thank you, Mr. Chairman. My name is Ken Smith, Assistant Secretary. To my right is Ted Krenzke, and to his right is Dick Balsiger.

Joe, do you want to introduce your people?

Mr. EXENDINE. I am Joseph Exendine, Deputy Director of the Indian Health Service. To my immediate left is Johnnie Kirkland, Program Analyst with the Indian Health Service, and to her left is Joe Moran, the Director of the Office of Contracts and Grants, Health Services Administration, and to his left is George Wolfe, Director of the Operations Division, Office of Procurement and Logistics of the Office of the Assistant Secretary.

Senator COHEN. Mr. Smith?

Mr. SMITH. Good morning, Mr. Chairman. It is a pleasure to be before this committee this morning to discuss the Bureau of Indian Affairs' contracting with Indian tribes under the Indian Self-Determination Act.

I have already introduced Mr. Ted Krenzke and Dick Balsiger. In the audience, at the committee's request, are Bob Beuley and Arnold Baron of the Department of the Interior's Inspector General's Office of whom I am sure there will be some questions.

My prepared statement was submitted to the committee on Monday. With the committee's permission, I would like to summarize that statement.

Senator COHEN. Without objection, your prepared statement will be made a part of the record of this hearing.

Mr. SMITH. Since the Indian Self-Determination Act was passed 7 years ago, there has been a steady increase in the number of tribes operating reservation programs under Self-Determination contracts. Of course, we like to feel that the legislation has been successful. I think there are some minor problems, just like with any new legislation, and it takes time to streamline it and to improve the process.

From 1977 to 1981, the number of tribes entering into contracts increased from 200 tribes to 380 tribes. There were approximately 800 contracts in 1977, compared to 1,300 separate contracts in 1981, showing a substantial increase.

During the same period of time, the dollar volume of contracting increased from $100 million in 1977 to $215 million in 1981. Now, when we are talking about these figures, Mr. Chairman, we are talking about Public Law 93–638 contracts. We do have other contracts, but these are authorized under other legislation.

The tribes are contracting for programs across the broad range of contractible Bureau programs in Indian services, education, and trust responsibilities. In fact, as I understand, in our Indian services programs, tribes are contracting approximately 50 percent of all those programs, so they are making substantial gains.

We believe this heavy increase in tribal contracts reflects very significantly tribal progress in the use of their contracting options. The increase also shows that tribes are accepting more responsibility for doing things for themselves and, in effect, being more responsive to their own people.

This administration, as well as myself, is strongly committed to the philosophy and objectives of self-determination and supports contracting by tribes.

I think this is one of the initiatives that we want to push. We think it is a good process. And I would like to see tribes contract more programs in the next few years.

We are in the process of changing our contracting regulations. The need for the change is primarily due to the enactment of Public Law 95–224, the Federal Grant and Cooperative Agreement Act, which was enacted in 1978. This act requires that Federal agencies reexamine the relationships that exist with recipients of their contract funds to determine whether these relationships are procurement or assistance in nature.

If the principal purpose of the action is acquisition of property or services for the direct benefit or use of the Federal Government, a contract would be the proper instrument of award. If the principal purpose of action is to accomplish a public purpose for support or stimulation, an assistance award would be appropriate, namely either a grant or cooperative agreement.

We believe revisions of the regulations providing for the use of grants is consistent with the government-to-government relationship between the U.S. Government and the tribes.

Mr. Chairman, I want to make it clear that shifts from contracts to grants does not mean any change in the level of Federal responsibility for the programs or activities involved.

Draft regulations were first circulated in May 1981, and a revised draft last September. Comments were received from tribes and tribal organizations, and their comments evaluated. Consultation meetings were held on these particular regulations. In addition we hope to publish the draft regulations for comments within the next months, and implement them as soon as they are officially approved.

We believe the revised regulations will permit the Bureau to expedite the grant process as well as allow the Bureau to be more responsive to tribal applications.

One of the concerns discussed in my prepared statement has to do with the indirect cost contract support funding problem. I know that members of the committee may have questions on the matter of shortfalls in the contract support fund's budget item. However, I do want to briefly comment on the subject now.

The amount of our budget request for contract support funds has been based in the past upon an estimate of the dollar volume of contracts and an average tribal indirect cost rate. During each of the past 2 fiscal years our budget request has been exceeded by the amount requested by tribal contractors. We experienced a shortfall of approximately $1.3 million in 1980, and about $1.5 million in 1981. Based on our estimates for 1982, we will have a higher shortfall than in previous years.

We will be watching this closely in 1983, and if we determine that we may have a shortfall problem, we plan to take early action rather than wait until towards the end of the first year.

Difficulties in predicting the volume of tribal contracts and problems in forecasting average indirect cost rates have been the two factors most affecting the accuracy of the Bureau's budget request for contract support funds.

This matter of indirect cost is a complex issue. It is not an easy issue. There are many avenues and many options that are open to us. Because of this, we asked the American Indian Law Center to review the problem and make their recommendations for corrective action. The report was a good one and provides a basis for change in the whole arena of contract support funds. I am sure we are going to be taking a very good look at that report, Mr. Chairman, as we move forward in this area.

Senator COHEN. Before or after the regulations become effective?

Mr. SMITH. Well, this report really addresses the contract support funds and does not address the grant or the contract. Basically it does not address regulations. It only addresses the cost ratios and so forth and how to administer those a little bit better than we have in the past.

Mr. Chairman, I am sure we are going to be implementing a good majority of those recommendations. We think those recommendations they made are excellent. I have doubts on a couple of them but we could get into those a little bit later.

Mr. Chairman, that concludes my opening remarks. We will be happy to respond to any questions you may have.

[The prepared statement follows:]

PREPARED STATEMENT OF KENNETH L. SMITH, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the committee, I am pleased to appear before your committee today to discuss the Bureau of Indian Affair's administration of the indirect cost and contract provisions of the Indian Self-Determination and Education Assistance Act of January 4, 1975 (Public Law 93-638). In addition to problems we are addressing in implementing that act, we also wish to discuss the change required by Public Law 95-224, the Federal Grant and Cooperative Agreement Act.

The Indian Self-Determination and Education Assistance Act was enacted by Congress "to provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for

Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities."

Title I of Public Law 93-638 is the Indian Self-Determination Act and it directs the Secretary of the Interior, upon request of any Indian tribe, to enter into a contract or contracts with any tribal organization or any such Indian Tribe to plan, conduct, and administer programs for the benefit of Indians.

First, we think it would be useful to report on the status of tribal contracting under the self-determination act. Though we are looking for ways to more effectively implement the act, we think overall the 7-year-old legislation has been successful. There has been a steady increase in the number of tribes operating reservation programs under self-determination contracts.

For example, in fiscal year 1981, approximately 380 tribes and tribal organizations entered into 1,300 separate contracts with the Bureau to operate programs. This is a significant increase over the fiscal year 1977 performance when some 200 tribes and tribal organizations entered into approximately 800 separate program contracts. During this same period, the dollar volume of contracting increased from approximately $100 million to around $215 million.

The tribes are contracting for programs across the broad range of contractible bureau activities; for example, approximately 50 percent of total Indian services program dollars—for such programs as social services, housing, law enforcement, tribal government—are now contracted. Tribes also contract for a significant part of the Bureau's education programs and certain contractible elements related to trust responsibilities.

Tribes within all bureau geographic areas are participating in Public Law 93-638 contracting.

Our heaviest volume of contracting with a single tribe is with the Navajo Nation: 34 separate contracts in fiscal year 1981 for a dollar volume of $43.5 million.

Some 37 Pacific Northwest tribes in the Portland area contracted for approximately $31.6 million under some 244 separate contracts.

The next largest dollar volume of contracting was by some 33 tribes served by the Phoenix area—135 contracts for a total of $24 million and in Alaska, native Alaska organizations contracted for $21 million under 77 separate contracts. In fiscal year 82, in accord with generally reduced program levels, tribal contracting is down somewhat from fiscal year 1981 totals, but not significantly.

We believe that these totals reflect very significant tribal progress in the use of Public Law 93-638 contract options. They show tribes more and more accepting responsibility for doing things for themselves in an effort to be more responsive to their people. This also often means jobs for tribal members that were not there before, which is important to the economic life of the Indian community.

I would like to add that this administration is strongly committed to the philosophy and objectives of self-determination for tribes as defined in Public Law 93-638. We firmly believe that tribes should receive all encouragement and technical assistance needed to aid them in contracting for the operation of Bureau programs and services. The accomplishment of this objective—tribal contracting under Public Law 93-638—is a main thrust of this administration.

I would now like to outline briefly how Public Law 95-224 has necessitated changes in our self-determination regulations and then discuss some problems associated with indirect costs and contract support matters.

REVISION OF REGULATIONS

The Bureau, in compliance with Public Law 95-224, the Federal Grant and Cooperative Agreement Act, and in accord with administration policy to make self-determination for Indian tribes more meaningful, is revising regulations implementing Public Law 93-638, the Indian Self-Determination and Education Assistance Act, to change the basic method of award from contracts to grants.

By way of background, we note that Public Law 93-638, enacted in 1975, offers tribes the right to contract with the Bureau of Indian Affairs to operate reservation programs or services otherwise provided by the Bureau. Appropriate Federal regulations, implementing this Public Law 93-638 contracting procedure, have been in place since 1976.

The Federal Grant and Cooperative Agreement Act, enacted in 1978, requires that Federal agencies reexamine the relationships that exist with recipients of their contract funds to determine whether those relationships are procurement or assistance in nature. If the principal purpose of an action is acquisition of property or services for the direct benefit or use of the Federal Government, a contract is the proper instrument of award. If the principal purpose of the action is to accomplish a public purpose of support or stimulation, an assistance award is appropriate, namely, either a grant or a cooperative agreement.

In keeping with the administration's policy to promote Indian self-determination, the grant mechanism appears to be the more appropriate assistance instrument to use in providing funds for the operation of BIA reservation programs by tribal governments or tribal organizations. Accordingly, the Bureau is revising its regulations to provide for the use of grants in those programs.

Draft regulations were circulated on September 25, 1981 to tribes and tribal organizations for comment. Comments have been received and evaluated. Consultation meetings were held with tribal leaders. The draft regulations were again revised to reflect the views of tribal leaders and national Indian organizations. Publication of proposed regulations in the Federal Register should occur in July. After a period of further tribal comment and appropriate revisions, the final grant regulations will be issued as soon as possible.

The revised regulations will, we believe, permit the Bureau to expedite the grant allocation process as well as allow the Bureau to be more responsive to tribal applications. The major changes resulting from the revisions are: Change from contract to grant as the normal award procedure; Cooperative agreements will be used where there is substantial federal involvement; Basic responsibility for review, award and administration of the grants will be at the reservation level, with the agency superintendent; Bureau's responsibility to provide preapplication assistance is increased; Lack of funding and inadequate tribal management systems are made grounds for declination; and Declination authority is delegated to the area director.

ADMINISTRATIVE COST/INDIRECT COST PROBLEMS

One of the concerns we wish to review with you has to do with what is generally referred to as the indirect cost/contract support funds problem. While we have covered some of this material in different reports to the Congress, we are anxious to bring you up to date on the current situation, especially as it relates to our plans for dealing with it. We would like to discuss first, the matter of shortfalls in the contract support funds budget item.

CONTRACT SUPPORT FUNDS SHORTFALL

Section 106(H) of Public Law 93–638 requires that "* * * the amount of funds provided under the terms of contracts entered into pursuant to sections 102 and 103 shall not be less than the appropriate secretary would have otherwise provided for his direct operation of the programs * * *".

In keeping with this statutory requirement, the annual budget request submitted by the Bureau of Indian Affairs includes a separate line item for contract support funds. When tribal organizations contract for the operation of Bureau programs, they incur costs for the administration of the program which go beyond those covered in the Bureau program funds.

Thus, the principal function of contract support funds is to reimburse tribes for the additional costs they incur as a result of entering into a Public Law 93–638 contract. Since its inception, these funds have been distributed to tribes on the basis of indirect cost rates established through audits made by the Inspector General or, under certain conditions, lump sum payments for administrative costs may be negotiated by the Bureau.

The amount of the budget request for contract support funds has been based upon an estimate of the volume of tribal contracting and an average tribal indirect cost rate. During each of the past 2 fiscal years, our budget request has been exceeded by the amount requested by tribal contractors.

In fiscal year 1980, we experienced a shortfall of approximately $1.3 million, and in fiscal year 1981 the shortfall amounted to approximately $1.5 million. Most of this shortfall, however, was covered through the use of savings in program funds. A shortfall for fiscal year 1982 was estimated, based on a survey of our field offices early this year, to be higher than in previous years.

Difficulties in predicting the volume of tribal contracts and problems in forecasting average indirect cost rates have been the two factors most affecting the accuracy of the bureau's budget request for contract support funds.

INDIRECT COST RATE/LUMP SUM AGREEMENT FOR CONTRACT SCHOOLS

Another concern we have had relates to lump sum agreements for contract schools. Public Law 95–561, the education amendment of 1978, mandated the use of formula funding for program costs of all bureau schools. Accordingly, the Bureau's office of Indian education programs developed a formula which assigns weighted factors that are convertible to dollars relative to student population, grade levels, educational needs, residential programs, etc. Based on variables that are incorporated into the formula to address all possible costs, each school then operates under a funding level that is equitable with regard to a comparable facility in the Bureau system. This same formula is also used to identify program costs for contract schools.

To complement this formula, the Bureau's office of Indian education programs prepared draft guidelines, issued in February 1981, which were intended to identify other costs of contract schools not covered by the formula. A series of discussions were held with contract school representatives, the guidelines were revised several times, and reissued on September 25, 1981. Reaction to the lump sum guidelines has been generally positive although some contractors have suggested the development of a formula to cover these nonprogram costs. This is being considered.

PROBLEMS POSED FOR SOME TRIBES BY USE OF THE INDIRECT COST RATE PROCEDURE

Procedures associated with the use of an indirect cost rate, as the basis for compensating tribes for overhead costs incurred by contracting Federal programs, pose serious problems for some tribes and tribal organizations. Tribes negotiate an indirect cost rate (IDC), in accord with Federal standards, with the Office of the Inspector General. Once negotiated, this IDC, which generally is accepted by all Federal agencies, is added to the program amount of the tribe's Public Law 93–638 contract. Within available funding, the Bureau thus pays its full share of tribal indirect costs generated by the Bureau contract. However, some Federal agencies place limits on the amount of indirect costs they fund. When this occurs, tribes and tribal organizations may not recover all indirect costs which would be expected by general application of its IDC.

In summary, we are dealing with a complex and difficult set of problems. In recognition of this, and following several unsuccessful internal efforts to deal with the problem in recent years. The Bureau of Indian Affairs issued a contract on November 20, 1981 to the American Indian Law Center (AILC) to review this entire complex of related problems and to provide appropriate recommendations. The AILC staff assigned to the effort has had extensive, applicable prior experience in matters of direct and indirect costs and related Federal regulations and procedures.

A draft report covering findings and recommendations was completed in early February 1982. This draft report was reviewed and commented on in considerable detail at a meeting held on March 11, 1982. The meeting was attended by staff from BIA and the Office of Inspector General; a number of tribal representatives; national Indian organizations; and members of accounting and legal organizations which have concerns with the contract support/indirect cost problems. After the meeting, the participants were urged to provide additional written comments for consideration.

A final report was provided to the Bureau in April 1982. This report has undergone critical review within the Bureau, and consideration is being given to the implementation of the major recommendations. The most significant finding of the study is that the root of the problems and difficulties being encountered, in relation to contract support/indirect costs, lies in the decision to base contract support funding on tribal indirect costs and distribute contract support funds on the basis of tribal indirect cost rates. Some of the recommendations in the report are:

To discontinue allocation of contract support funds on the basis of tribal indirect cost rates; To develop a statistical method for determining total BIA cost for a particular contracted program by applying a statistically derived ratio (overhead rate) to the program amount; To use contract support funds to supplement costs to the tribes for operation of a program only until the overhead cost can be incorporated into the BIA program budget; To include funds for both direct and indirect costs in all BIA Public Law 93–638 contracts; To discontinue the use of separate funds for indirect cost; To handle contract support funding for contract schools the same way as for other Public Law 93–638 contracts; To assist tribes in documenting specific cases of failure by other agencies to fully fund indirect costs; and To amend the fixed rate/carry forward process to make it applicable only to programs incurring an actual over-recovery.

We have initiated action to implement most of these recommendations and believe this will result in constructive benefits to all tribal contractors. We recognize that there will be a need for extensive and continuing orientation and training for both Bureau and tribal staff in effecting the planned substantial changes. We will continue to consult with tribes and tribal organizations as we move forward in this process.

This concludes my prepared statement. I will be happy to answer any questions you may have.

Senator COHEN. Do any other members of the panel have statements to make?

Mr. SMITH. Yes. Joe Exendine has a statement.

STATEMENT OF DR. JOSEPH N. EXENDINE, DEPUTY DIRECTOR, INDIAN HEALTH SERVICE, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY: JOHNNIE KIRKLAND, PROGRAM ANALYST, INDIAN HEALTH SERVICE; JOE MORAN, DIRECTOR, OFFICE OF CONTRACTS AND GRANTS, HEALTH SERVICES ADMINISTRATION; GEORGE WOLFE, DIRECTOR, OPERATIONS DIVISION, OFFICE OF PROCUREMENT AND LOGISTICS, OFFICE OF THE ASSISTANT SECRETARY, DEPARTMENT OF THE INTERIOR

Dr. EXENDINE. Thank you, Mr. Chairman.

I am Dr. Joseph N. Exendine, and I am the Deputy Director of the Indian Health Service. I appreciate this opportunity to testify on the funding of contracts by the Indian Health Service under the Indian Self-Determination Act, Public Law 93–638.

We have two additional people that I would like to introduce. The first is Mr. Sidney Edelman, special assistant to the assistant general counsel, Public Health Division, Office of the General Counsel. We also have Mr. Howard Roach, Chief, Financial Management Branch, Indian Health Service.

In the recently published report, "Budget Views and Estimates for Fiscal Year 1983," the committee expressed its concern that the Indian Health Service may not be able to pay the full costs recoverable to 638 contractors. The concern was expressed specifically in terms of indirect costs rates and our ability to meet the tribal rates. To be more specific the problem is how the total level of needed funding is determined and what funds are available to support that level.

The crucial question is, can the Secretary of Health and Human Services make available to the tribe sufficient funds to enable the tribe to carry out those secretarial programs for which the tribe wishes to contract? Up to now, the Indian Health Service has been able to provide the funds necessary to permit contractors to operate at a level at least equivalent to the level at which Indian Health Service would have operated had Indian Health Service retained the program.

There are three interrelated requirements of Public Law 93–638 which affect the funding of Public Law 93–638 contracts. No. 1, the Indian Health Service is required to contract with tribal organizations that meet the conditions of Public Law 93–638. No. 2, Indian Health Service is required to make available to the tribe an amount of money not less than that which Indian Health Service would have had available for its operation of the program. No. 3, Indian Health Service is prohibited from curtailing services to other tribes as a result of a Public Law 93–638 contract.

I would like to briefly outline the factors which go into determining the needed funding for the program a tribe wishes to contract for under Public Law 93–638. The first factor is the determination of the statutory level of funding. The statutory level of funding is the total amount of Indian Health Service appropriated funds which the Secretary would have to carry out a program during a fiscal year. The complexity of this determination is affected by what specific program the tribe is requesting to take over.

In any case, there are certain funds that are relatively easy to identify because they are exclusively involved in or attributed to the program the tribe wishes to take over. These funds are frequently, but not exclusively referred to as direct or program funds. Other funds in the statutory level are more difficult to identify because they are unit costs that are not exclusively attributable to the program in question. Again, they go by a number of names including, administrative, indirect, and management. Examples would be the expenses for area/program offices, and service units. The key element in differentiating the funds is the ability to exclusively attribute them to the Indian Health Service program and not the often conflicting terms used to describe the funds.

In addition to the statutory level, there are certain costs that do not appear anywhere in the Indian Health Service budget but which the contractor must incur. These are referred to as non-Federal operation costs. For example, the Government is a self-insurer, but if a tribe elects to take over an Indian Health Service function under a Public Law 93–638 contract, the tribe must purchase liability insurance, for example, malpractice insurance. The cost of this insurance is a legitimate expense of conducting the contract but represents a cost not reflected in the statutory level of funding.

Another example is the depreciation or use charges associated with amortizing the replacement cost of equipment and facilities the contractor must utilize in the conduct of the contract. The Government does not incur these costs, per se, in its own operation, but rather budgets for replacement only when the equipment or facility is actually to be replaced.

A final element in determining the level of needed funding has to do with expenses unique to the contractor and the Public Law 93–638 process. An example of this is section 103(b)(2), which requires that, to the extent, practical, the Secretary take steps to assist the tribe in developing the capacity to take over and effectively operate Indian health programs.

In addition, there are situations in which, because the tribal contractor does not have the same economy of scale available to Indian Health Service, the contractor's cost is greater than that of Indian Health Service. These expenses are above and beyond the statutory level of funding for direct Indian Health Service operation of the program and must be considered to determine the contract level of funding. Some of these expenses are one-time costs; nevertheless, they are related to the total resource issue.

Once the needed level of funding is determined, the process turns to the task of determining what appropriated funds can actually be made available to the contractor. Appropriated funds directly attributed to the program in question can clearly be made available.

It is the remaining costs that cause the problem. As mentioned earlier, liability insurance is a non-Federal operational program cost that is not reflected in the appropriated amount for carrying out the program but which, nonetheless, is facing the tribal contractor. A similar situation may exist where there are costs uniquely related to the 638 process as mentioned above; that is, section 103(b)(2). Those non-Federal operational costs which can be delayed; that is, depreciation of equipment and facilities, become a problem to the contractor only when the equipment or facility must actually be repaired or replaced.

Funds that are not exclusively attributable to the program in question present another funding problem. Though the contractor is entitled to receive a portion of these nonexclusive funds, the Indian Health Service may not be able to free up these funds. The most common example of this is fractional employee costs where the employees involved are required for other continuing Indian Health Service responsibilities and, therefore, their costs cannot be made available exclusively to the 638 contractor.

The question arises at this point of the source of funds which either represent costs beyond the current statutory level or statutory level funds that cannot be broken out and made available to the contractor.

Since fiscal year 1976, Congress has appropriated special funds to enable Indian Health Service to fund the additional costs of the Public Law 93-638 contracts. Prior to fiscal year 1981, these special funds were identified separately. Since fiscal year 1981, these special funds have been included in the hospital and clinical services budget category. The appropriations have also included funds for tribal management support.

After Indian Health Service identifies all statutory level funds that it can make available to a contractor, the balance required to reach the needed level of funding is taken from one or both of the two above sources. These latter funds are frequently identified as being available for a tribe's indirect costs, but in reality are only the additional funds required to reach the needed level of funding.

Senator COHEN. What is the status of those funds right now, in terms of the application to the 638 contracts? How are they holding up?

Dr. EXENDINE. Up until now, we have been able to meet 100 percent of all the indirect cost rates, overhead costs, over and above program costs. We could possibly run into some problems once the indirect costs rates are readjusted and if they are readjusted upwardly—we have about $2.6 million that we could use toward that.

Now, if additional tribes come in, or tribes which already have programs wish to take on additional programs, we perceive some possible problems down the road. But up until now, we have been able to meet these expenses.

Senator COHEN. What about the rate of increase of the appropriations? Are you going to have enough funds in the supplemental to cover these overhead costs?

Dr. EXENDINE. Starting in 1981, Mr. Chairman, we changed our entire budget structure. Let me separate the two categories. For programs that were run by the tribes or which they started to take over, we took the program dollars and supplemented that with a kitty that we call supplemental funds to give them the necessary dollars over and above what IHS costs were. We transferred these supplemental funds into the hospital and clinics budget category. We did that in 1981 in order that any time we got program increases the tribes shared those program increases right along with us. That was more or less to protect the tribes. And, of course, if we got decreases, they also shared in the decreases.

Senator COHEN. Where does the money come from?

Dr. EXENDINE. It is actually budgeted in appropriations.

Senator COHEN. What has been the level of increase in those appropriations for that function?

Dr. EXENDINE. For the most part, it has been running about 9.4 percent. It depends on the budget category. For supplies, it may be 7 percent. If it is in contract for medical care services, 9.4 percent. It varies from about 7 percent up to about 11 percent. But it is averaging out about 9.4 percent.

Probably the issue the tribes are faced with is the fact that inflation in some instances has risen much more drastically than 9.4 percent.

Senator COHEN. So what happens then?

Dr. EXENDINE. The tribes will also share in those decreases. They share whatever rate of increases or decreases we get and they have to make adjustments as we do in the Indian Health Service. In some cases, they may cut back on programs. They may cut back on certain services along this line.

Whatever we experience, we pass on to the tribes. And I would say, with the exception of the $2.6 million in tribal management funds, that they share in all the increases, in appropriations, with the exception of alcoholism and urban programs.

Continuing with my remarks, Mr. Chairman, the resulting Indian Health Service Public Law 93–638 contract is for the total amount of funds which Indian Health Service has been able to identify and is able to make available to support the total program being contracted. Each contractor has its own accounting system which designates a particular cost as either direct or indirect. Regardless of the indirect cost rate a particular tribe or tribal organization may have, the total funds made available through the contract cannot be for more than the funds determined to be available to support the program being contracted.

Categorizing the available funds as either direct or indirect does not change the above results. If an indirect cost rate would result in Indian Health Service having to transfer funds serving another tribe, the only alternatives are to lower the amount identified as direct or to use funds specifically appropriated to cover these increased costs.

One point of clarification. Indirect cost rates are never determined by Indian Health Service but rather by a cognizant agency. For the most part, the cognizant agency for Indian Health Service Public Law 93–638 contracts is the Office of the Inspector General of the Department of the Interior.

It is the policy of the Department of Health and Human Services to pay indirect costs based on the indirect cost rates established by the cognizant agency.

As I mentioned, Indian Health Service has so far been successful in providing the funds necessary to meet the required contract funding level despite problems and questions in applying systems aimed at different contracting relationships than that envisioned by the Indian Self-Determination Act. We are hopeful that our success will continue but are keenly aware of the potential difficulties ahead and are prepared to explore other methods.

Mr. Chairman, that concludes my opening remarks. At this time I will be happy to answer any questions the committee may have.

Senator COHEN. Is the Indian Health Service running into a problem with these supplemental funds, in the 638 experience?

Dr. EXENDINE. We could probably run into problems. As Mr. Smith indicated, most of the auditing is done by the Inspector General's Office at the Department of Interior. Once the audits are conducted, and final indirect cost rates are determined, and if the result is that the rates are adjusted up, then we could run into a problem. Also if more tribes take over the programs, we could run into problems.

Senator COHEN. I have a series of questions I would like to ask you now and perhaps some for the record, but, Mr. Smith, let me return to you.

If the 638 regulations are amended as proposed, to what extent would Interior, BIA continue to utilize contracts with tribal governments?

Mr. SMITH. Ted, do you want to respond to that?

Mr. KRENZKE. I did not quite get the last portion of that question, sir.

Senator COHEN. Assuming the regulations do go into effect, to what extent will you continue to use the contracts with tribal governments?

Mr. KRENZKE. When the new regulations go into effect, we would essentially expect that in relation to Public Law 93–638 contracts, that when we enter into new instruments of agreement with tribes that we would change from contracts to grants, and we would be phasing out the use of contracts and use grants entirely.

Senator COHEN. One of the major concerns expressed by the tribes is the question of whether they will have continued access to General Services Administration as a supply source. Will they continue, under this new grant procedure, as opposed to the contracting procedure, to have access to GSA?

Mr. BALSIGER. One of the problems that we have in relationship to the grant procedures is whether or not they would have access to GSA schedules, and we are working with the General Services Administration to clarify that point, and particularly so that tribes could use the GSA automobiles. Basically, you can buy a number of things that the tribe needs in relationship to other property and other programs almost as cheaply on the open market as you can from the General Services Administration. But it is a problem and it is one that we are working on to clear up.

Senator COHEN. Well, if you can buy it on the open market as cheaply as you can from GSA, then why is there a problem?

Mr. BALSIGER. Well, the problem is with the use and rental of automobiles. That is a cheaper program with GSA.

Senator COHEN. But you are saying everything else, other than the use of automobiles———

Mr. BALSIGER. No, I am saying that there are a number of items on which the GSA schedule and the schedule of mass buying are pretty close.

Senator COHEN. Let me ask you this way. What action do you contemplate, assuming you cannot work out these difficulties and that they cannot continue to purchase through GSA, what is the Interior Department or BIA going to do in terms of dealing with the issue to make sure that the additional costs, if any, in purchasing on the open market are not borne by the tribes, which would come in the reduction of services in the programs?

Mr. BALSIGER. We would have to make that adjustment in relationship to the amount of the contracts and the contract dollars. We also would go out and work with open market purchasing, like in the automobile situation, to get fleet discounts, which would bring it back closer into line with GSA operations.

Senator COHEN. Do I understand then that Interior or BIA is making a commitment that in essence there is going to be almost a hold harmless in this transfer in going from contracting to grants; that there will be no change in terms of the burden imposed upon the tribes as far as access to lower-cost items? It seems to me you cannot go forward with these regulations and changes unless you are prepared to do that?

Mr. SMITH. Well, as I understand, that was the only one item that was brought up, the GSA motor pool, and that is a matter of dealing with GSA, and trying to get a waiver.

Senator COHEN. Do you not think you ought to do this before the regulations go into effect?

Mr. SMITH. We are in the process of trying to get that waiver now, Mr. Chairman.

Senator COHEN. Not trying. The question I am asking is, should that not be done before? In other words, what is going to take place? We are going to have this all done in a month's time and we are still trying to work it out in the meantime and it has not been resolved. So what I am asking you is, do you not think there ought to be some resolution of the issue before the regulations go into effect?

Mr. SMITH. Before we implement them, you mean?

Senator COHEN. Either before you implement them or before they go into effect, either way.

Mr. SMITH. That is a possibility.

Senator COHEN. Not a possibility. The question I am asking is, before BIA goes through this changeover in the system, contracting to grants, it seems to me that you ought to resolve that issue before it becomes effective. If that is one of the major concerns on the part of the tribes, they are going to get stuck with higher costs and they are going to have to take it out of the program. Something is wrong with that.

Mr. SMITH. Well, Mr. Chairman, I think it would depend on what type of a cost we are talking about. I think if it is a minor cost to the total contract, then we are not talking about too much. If it was a material amount of cost, then I would have some reservations about implementing any regulations.

Senator COHEN. What advantage is it to the tribes to go to a grant as opposed to a contract? Why should they be satisfied with that?

18

Mr. SMITH. Well, I am looking at it now, since I was on the other side of the fence, which I was, and if they want to term it as a contract versus a grant, I would say, fine, if you want to cross-out the contract, let us just call it a grant.

Senator COHEN. Forget about the semantics of it. Call it what you want, all I am looking at is the bottom line, saying it is going to cost us more money if you do it this way. You call it a grant and we are going to get stuck because we cannot deal with GSA anymore and we have got to take those moneys out of the program to deal with these costs. So, they don't care what you call it. What they really are concerned about is if you call it something else and it changes the nature of the relationship and it imposes more costs on them.

Mr. SMITH. Of course, as you know, Mr. Chairman, we have to deal with the specific law that was passed by Congress and that is the one that we are trying to comply with. Our Solicitor's Office has indicated that they feel we have to comply with that particular law, and that is the basic reason that pushed us into this particular arena.

Senator COHEN. So you are recommending that we change the law, then, to make sure that GSA is still available?

Mr. SMITH. Yes.

Senator COHEN. Is that your recommendation?

Mr. SMITH. The recommendation is that they should be able to utilize the GSA facilities and the mechanisms to purchase equipment and utilize GSA.

Senator COHEN. Even though we call it a grant instead of a contract?

Mr. SMITH. Yes.

Senator COHEN. Would you recommend that we amend that, if you can not work it out administratively?

Mr. SMITH. You mean amend——

Senator COHEN You said your attorneys have told you that you have got to comply with the law as written and you are going to try and resolve that dispute over whether or not GSA remains available to the tribes, and if you cannot do that, that you would recommend that we change the law to make certain?

Mr. SMITH. I think that would be one option. If we cannot work the other items out, I think one suggestion might be to amend Public Law 95–224 to provide it. That is an option.

Senator COHEN. If you cannot work that out, then you would recommend to this committee that we undertake to amend that law?

Mr. SMITH. I have never really thought that one out, Mr. Chairman, but that would be my option.

Senator COHEN. That is one of the purposes of these hearings.

Mr. SMITH. I know we discussed this the other day with some of the staffers, and it is too bad that we did not see this thing coming well before, while this law was being——

Senator COHEN. That is one of the purposes of having the hearing; not to engage in any kind of antagonism, but rather to explore what the options are so we can achieve the same desired goal.

Mr. SMITH. Ted might respond.

Mr. KRENZKE. Mr. Chairman, we are aware of this difficulty, and we have requested waiver by GSA. This issue has not been resolved up to the present time and we recognize this and we also recognize that there could be a serious problem as far as the tribes are concerned.

Our plans are to go ahead and to continue the publication of the regulations for comment and having received the comments we will be able to continue to work during that time with GSA. It would be our hope that before they came in, in final, that it would be worked out. If not, we would certainly have to take a look at it in terms of timing of implementation and consider very distinctly this possibility of the kind of legislation that we have been talking about here.

Senator COHEN. Is it fair to say that if it comes to that, you would come to the committee and be supportive of that concept, that amendment?

Mr. SMITH. I think we would be supportive of that.

Senator COHEN. Thank you.

If it is determined that once the granting mechanism is implemented by Interior the tribal organizations will no longer be entitled to—let me strike that. I want to go back. Are you familiar with section 274-31 regarding the general grant requirements? Do you have that? There is a provision that proposes more restrictive conditions on a tribal grantee where the Bureau has determined that such tribe has violated performance requirements or has a management system that does not meet the standards set out in 25 CFR part 276. Are you familiar with this, under the uniform administrative requirements for grants?

Mr. SMITH. I am not familiar with that.

Senator COHEN. Let me send it to you in writing, but apparently it is a more restrictive interpretation in dealing with tribes under this section 274-31, that when they have violated a performance standard they have a much more restrictive application to the tribes, and the question is, why are these restrictive conditions not spelled out in the regulations. It is a more technical question but I will give that to you with some specificity so you can respond to it for the committee record.

[Subsequent to the hearing the following information was received for the record:]

To carry out our responsibilities for delivering programs to the Indian people and to discharge our responsibilities to the taxpayers it is necessary that strict measures be taken when services are inadequate or when accountability for funds is in question.

Provisions such as you refer to are entirely consistent with the provisions of OMB Circular A-102. A copy of the relevant language of that circular is attached. The regulations cannot adequately specify the various forms such special requirements might take since they would be individually tailored to specific management problems.

[No. A-102]

Attachment F—Matching share
Attachment G—Standards for grantee financial management systems
Attachment H—Financial reporting requirements
Attachment I—Monitoring and reporting program performance
Attachment J—Grant payment requirements
Attachment K—Budget revision procedures
Attachment L—Grant closeout procedures
Attachment M—Standard forms for applying for Federal assistance
Attachment N—Property management standards
Attachment O—Procurement standards
Attachment P—Audit requirements

9. *Requests for exceptions.* The Office of Management and Budget may grant exceptions from the requirements of this circular when permissible under existing laws. However, in the interest of keeping uniformity to the maximum extent,

deviations from the requirements of this circular will be permitted only in exceptional cases.

10. *Exceptions for certain recipients.* Notwithstanding the provisions of paragraph 9 if an applicant/recipient has a history of poor performance, is not financially stable, or its management system does not meet the standards prescribed in the circular, Federal agencies may impose additional requirements as needed provided that such applicant/recipient is notified in writing as to: (a) Why the additional standards are being imposed; and (b) what corrective action is needed.

Copies of such notifications shall be sent to the Office of Management and Budget and other agencies funding that recipient at the same time the recipient is notified.

Senator Cohen. Can you tell me whether or not the Bureau of Indian Affairs is able to identify all of the administrative costs for the BIA-operated programs?

Mr. Smith. Our administrative costs, as I understand, Mr. Chairman, one of the recommendations that is being made in the particular study that I mentioned earlier is that we utilize our overhead rate because as you know, under 638, the amount of funds provided shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the program.

In other words, we should at least give the tribe costs similar to those that we incur. We know the direct program costs, but right now, I do not think we have done a study on exactly what is the overhead of the Bureau of Indian Affairs. Whether that would amount to 10 percent or would come out to 15 percent, this particular study recommends that we give a flat rate amont of overhead.

As you know, our study indicated we have tribal contract overhead now varying from tribe to tribe. It depends on the size of the tribe. It varies any place from 4.9 percent, as an overhead, up to 60 percent. And it depends on the volume. It depends on the resources of a tribe. The tribes with more resources seem to have a larger overhead. They seem to be more sophisticated and better able to deal with it. They know how to get the higher overhead rate. I am sure the IG would talk about that if he were asked more questions about how this mechanism works.

It is a complex type of situation and I think the report that was submitted to us recommending that we should at least provide the amount of money that it would take us to operate that same program, and that might turn out to be, say, 10 or 15 percent is not unreasonable. Of course, we would still have to add the additional costs and reimburse the tribe for costs that they have that the Government does not have. For instance, they might have general liability insurance, FICA, and some other costs, depreciation, and so forth, that the Government does not have.

I feel that the bigger tribes with the larger resources, with greater sophistication, can generate a larger overhead, and their overhead rates are probably a lot higher than for small tribes.

Senator Cohen. Has the Bureau determined the secretarial level of funding for a program to be contracted in the past?

Mr. Krenzke. Mr. Chairman, in the past we have not specifically determined the secretarial level of funding. We have essentially provided the contract support moneys to the tribes based on the establishment of an indirect cost rate by the IG's Office.

We anticipate, in the future, based on the recommendation of the report that Mr. Smith referred to in his opening remarks, to go to a system that would specifically address this issue of the secretarial level of funding. However, our in-house review of this situation would indicate that the amount of funding that we are generally providing to the tribes, through our present system, would in almost all cases exceed the secretarial level.

Senator COHEN. How do you determine that in the subsequent years? What is the formula?

Mr. KRENZKE. We anticipate doing a very complete analysis in determining a secretarial level of funding. We recognize it is a fairly complex matter, and it might vary a great deal even from program to program within the Bureau of Indian Affairs. It also may vary considerably from location to location.

What we anticipate doing before we move in that direction is to do a very detailed study of the numbers that are involved in that situation. Our anticipation is that this will probably not be possible until fiscal year 1984.

Senator COHEN. Do the contracted programs receive all of the increases or decreases as BIA-operated programs such as cost of living?

Mr. KRENZKE. The Government, as you know, receives regular supplementals for pay increases, and funding for those pay cost increases, as far as tribal employees, are not included. However, in recognition of that, for at least the past 3 fiscal years, we have requested the appropriations committees and they have provided funding in our regular budget for pay cost increases for tribal employees. So we do cover it on that basis.

Senator COHEN. So the tribal employees who are under contract, as opposed to a BIA-operated program, are in fact receiving cost-of-living increases?

Mr. KRENZKE. They are able to receive these pay cost increases, generally based on inflation, but not through the past cost supplementals of the Federal Government, but through the regular appropriation process.

Senator COHEN. The comments surrounding the BIA realinement included some heavy reliance on increased contracting of the BIA programs. Mr. Smith pointed out, there is going to be even more of an increase in reliance upon the contracting. Is the fiscal 1983 budget estimate sufficient to provide the additional cost for contracting?

Mr. SMITH. In 1983? Yes, it does. In our realinement, there is a variety of things. As you know, we had a GAO audit in September—it came out September 10, I think, 1981—that indicated some weaknesses that the Bureau of Indian Affairs had and the tribes had. We have taken some action to correct those. I think we are very weak in our contracting, in the Bureau of Indian Affairs. As I understand it, for instance, one contracting officer tries to administer 125 contracts, and that is just much too many.

In 1983, we are hoping to reduce that to where one contracting officer will manage 65 contracts, which means almost doubling our staff in the contract arena.

Also, we have got to beef up our monitoring and our oversight of these contracts that we do have with tribes. I think this has not been done.

Senator **Cohen**. What kind of figures are you using? What are you planning on for the new starts in total contracts in fiscal 1983? What kind of estimates are you working with?

Mr. **Balsiger**. I need the last part of the question, Senator.

Senator **Cohen**. What I want to know is, what sort of cost estimates are you working with for planning on new starts and these contracts for fiscal 1983? It is going to take more staff; it is going to take additional costs involved, and I just wanted to know the numbers.

Mr. **Balsiger**. What we have done is realine the method in which we operate in the contracting field and placed more responsibility and decisionmaking down at the lower level. We have set up in the contracting process at the regional level for both the oversight function and the contracting function.

What we are doing is, we are just about doubling the staff one way or another in order to meet the level of contracting that we have right now. We expect that with the number of major contracts that might come in in the next fiscal year that we will be able to adjust programs in such manner as to provide the necessary staff for the contracting.

For instance, we have right now several tribes which have requested to contract for total agencies. Those will be new contracts. Part of the functions out there are contracted now and if we contract the total agency, our organization is flexible enough to take care of those initial contracts.

Senator **Cohen**. The technical assistance budget estimate for fiscal 1983 has been cut by 25 percent. Mr. Smith, how is that going to affect the projection in increased contracting?

Mr. **Smith**. Is this in 1983?

Senator **Cohen**. Yes.

Mr. **Krenzke**. Mr. Chairman, when Public Law 93-638 was first passed, most all of the tribes throughout the country were just getting into the business of contracting with the Federal Government, and with the Bureau of Indian Affairs, in particular. As indicated in the opening statement, we now have nearly all of the tribes around the country involved in contracting and the kind of extensive technical assistance that was needed in its initial phases is not as extensive at the present time as it was initially. We would anticipate that the reduction in technical assistance can be absorbed and still use the resources that are left to concentrate particularly in these efforts where especially some tribes are anxious to contract virtually their whole operation.

I think that is where most of the emphasis will probably be taking place in the future, but the general need for the technical assistance on the ongoing basis is somewhat reduced by the tribe's overall experience in the contracting effort.

Also, it is true that most of the reduction that we are talking about in this technical assistance has taken place at the central office level and there continues to be technical assistance available at area offices throughout the country.

Mr. **Smith**. Mr. Chairman, as you know, in our budget in 1983, we have requested approximately $17 million for self-determination grants. These grants can be used to develop the administrative capabilities of tribes that wish to move into contracting and for tribes to take over some of these programs. This money is supposed to be used to address their personnel system; their procurement system; their accounting system, and to generally beef up their administrative management capabilities.

Also, in 1983, we have proposed a new initiative of $5 million that we hope will be approved, to help the small tribes. I think this is where we have the most difficulty in delivering meaningful technical assistance. We feel that if we can give the small tribes a small amount of money to hire a manager, hire a bookkeeper, and so forth, that this will improve these small tribes' administrative and management capabilities.

Senator COHEN. I appreciate that. All I was pointing out is, you have had a rather serious reduction of 35 percent in the technical assistance program.

Mr. SMITH. Yes. I think, Mr. Chairman, that this is key. The tribes really need help. We have got to upgrade and strengthen their capabilities to take these contracts. And I think this is the direction they are moving in, that this is the direction of this administration. I think we have got to work with tribes, and we have got to make sure we have adequate funds to be able to help them strengthen their capabilities to manage these particular contracts, or grants.

Senator COHEN. Mr. Smith, you mentioned the Indian Law Center study, and I would like a few comments about the study's recommendations on indirect costs and contract support. Are you familiar with that?

Mr. SMITH. I think I would like Ted to comment on that.

Mr. KRENZKE. Well, the whole study relates to that subject of contract support and indirect costs. I think the main thrust of the study, to the extent that they found fault with the present system, is that we have tied the allocation of the contract support funds to the indirect cost determinations. One of the major problems with this as an allocation system of the contract support money has been the fact that the funds have not actually been available to the tribes until the indirect cost rate has been established. And after it has once been established that the information has come into the Washington office and then the contract support funds have been made available to the field often quite late into the fiscal year.

The essence of the recommendations of the report are to the effect that we in large part base the future allocation of funds on the secretarial level of funding, plus we recognize that there are some other factors beyond the secretarial level of funding that the tribes have to contend with that the Bureau of Indian Affairs does not contend with.

Senator COHEN. Should there be a statistically designed ratio of overhead to program costs?

Mr. KRENZKE. Yes. That is what they recommend and overall we concur in this, although the study probably does not go into the detail in terms of recognizing some of the other factors that we recognize. So we think it has to go beyond just the statistical information pertaining to the secretarial level of funding, but also take into consideration real costs that tribes have that are simply not a part of the Bureau budget.

For instance, the Bureau of Indian Affairs does not pay any insurance costs out of its budget. In most cases, the tribes have had insurance costs in such areas as casualty insurance on facilities, vehicles, and things like this. They also have liability insurance. In some cases for certain tribes, especially small tribes, there is a problem of economy of scale that has to be dealt with. Sometimes the tribes need to have some legal counsel in association with the administration of some of their programs. Our legal counsel is furnished by the Solicitor's Office. It is not a part of the Bureau of Indian Affairs' budget.

So all of these factors will be taken into consideration, but the end result then will be that the tribes will have available and known to them the amount of money to go into the contracting process at the beginning of a contract period, the amount of contract support plus the program dollars, and the study recommends that eventually these be merged. And based on that knowledge, then, they contract for the total program, which includes both the direct costs and the indirect costs.

Senator COHEN. But you indicated you agree with the study's recommendation that you develop some sort of statistical ratio, but then you went on to explain about all the difficulties with that.

Mr. KRENZKE. It is not going to be a simple process, but clearly this whole business of contracting and contracting support is just not a simple process.

Senator COHEN. Are you capable of reducing it to some sort of statistical formula?

Mr. KRENZKE. We believe that we are. The Indian Health Service, in essence, is using that, I understand. I have had some brief discussion with them concerning this, and the information I get from them is that it is not an easy process. It is similar to what the Bureau of Indian Affairs went through when it went to funding education programs on a formula basis. I think there is a corollary there.

It is not an easy process but it has been possible to do it and it is not to say whatever we finally come up with is going to be absolutely perfect or satisfactory to everyone else. But, we think it is going to be significantly better for the tribes, especially in knowing the amount of dollars that they have available going into a given contract period and I think we will be able to administer the whole thing much more efficiently.

Senator COHEN. Mr. Smith, I think you indicated that about 50 percent of the total Indian Service program dollars are now contracted, is that right?

Mr. SMITH. Approximately. Yes, I think that was the right figure I used.

Senator COHEN. Has there been a 50-percent reduction in BIA personnel who were providing the direct services before?

Mr. SMITH. Not specifically. I think in time you will see reductions. If a tribe, say, takes over a particular program, naturally you will see people that we have in that particular program be reduced. Also you should see our FTE, full-time employees, being reduced as tribes contracting more and more.

Senator COHEN. Has there been any reduction?

Mr. SMITH. Yes, there has been. I do not know the exact numbers. Maybe Ted can respond to that a little bit better since he has been here more than 1 year.

Mr. KRENZKE. Mr. Chairman, if I could comment on that. Over approximately the past 6 or 7 years, during which this thrust in the contract area of the Indian services program has taken place, what we have seen is two things. No. 1, we have seen that generally speaking there has been an enrichment of many of these so-called Indian Services programs during that period of time. As an illustration, there has been a considerable increase in the law enforcement capabilities of the Bureau of Indian Affairs in terms of funding of tribal law enforcement programs. The same thing for courts and social service programs and things like this, so that at a time when the total amount of dollars for this program has increased, these programs—the combination has been approximately 150 percent or thereabouts—there has been an actual reduction in the number of Bureau employees in Indian Services.

The reductions also work on a specific basis. For instance, at one time we operated the law enforcement program on the Pine Ridge Reservation in South Dakota and we at that time had approximately 35 law enforcement personnel on our payroll. Since the contract has taken place, the Bureau of Indian Affairs has one person on our law enforcement payroll at Pine Ridge who provides special assistance to the tribes and works in relation to the monitoring and technical assistance in this contract.

During fiscal year 1982, the Navajo Tribe has taken over completely the operation of the social welfare program on the Navajo reservation. This is the largest single Public Law 93–638 contract that the Bureau of Indian Affairs has, approximately $25 million. At one time we had, if my memory serves me correctly, around 100 employees relating to the administration of that program. At the present time, we have five people monitoring this specific contract in the amount of around $25 million.

So, yes it does lead to a reduction in the number of Bureau people—the number of people who are on the Bureau of Indian Affairs' staff.

Senator COHEN. Are you shifting them over to contract monitoring presently?

Mr. KRENZKE. There are two things in respect to contract monitoring. As Public Law 93–638 has been effected, and we have gone from almost ground zero up to 1,300 contracts, yes, there has been an increase in the number of contracting monitors in the Bureau of Indian Affairs. In terms of the programs, there are, in some instances, people who had been involved formerly in program administration and are now what we refer to as contracting officers' representatives.

The illustrations that I used at both Navajo and Pine Ridge fit into that category, but at a much, much reduced rate. I would say generally something like not over 5 percent of the former number that we had.

Senator COHEN. Do you establish the indirect cost rates for tribes?

Mr. KRENZKE. No, the indirect cost rates that are established in respect to tribes are established by a cognizant agency auditing group. In reality, most of them throughout Indian country are established by the Interior Department's Inspector General's Office.

Senator COHEN. Is anyone here representing them?

Mr. SMITH. Yes, we have two people.

Senator COHEN. I understand the rates range all the way from 8½ to 70 percent? Can you tell me how that happens?

Mr. BUELEY. Bob Bueley, sir. A good part of it depends on how the tribe is organized and how their accounting system is set up, whether some programs are charged direct. You know some of the agencies, some of the bigger tribes, may have enough work in a particular program that they could have their own accountants just for that particular program, and in that case they could be being charged direct, whereas in a smaller tribe, the accountant could be servicing several programs and in that case it would be an overhead, sort of indirect cost item that you would spread across the other programs.

Senator COHEN. It is a very complex area but I am confused. Frankly, I do not know how you are going to distinguish, for example, indirect costs from incremental costs or administrative costs. How do you?

Mr. BUELEY. Well, we have guidelines, OASC–10, which was issued by HHS, and OMB Circular A–87, which lay out several of the guidelines as to the type of costs that would be applicable or allowable and the type that would be considered direct and indirect.

Senator COHEN. So those are spelled out specifically by OAS–10?

Mr. BUELEY. The categories. But then you have to look at the particular situation. As we said, for example, like accounting, normally if that accounting service unit is servicing several of the programs within the tribe, they would allocate that cost to all the programs. Therefore it becomes an indirect-type situation.

But if you had a big enough tribe that—let us say they had their own accountant in the housing improvement program, because it is so large—that could be charged direct to the program money and in that case it is a direct charge to the program. It is not an indirect kind of expense.

So it depends on how they are organized, how their accounting system is set up, and whether that cost is directly related to that program or whether that cost can be—it is a joint kind of sharing. It is applicable to several programs.

Senator COHEN. Tell me again how you get that range from 8½ to 70 percent on the indirect.

Mr. BUELEY. You can not just say in simple terms. It is basically depending on their direct labor base and the type of items they have, how big their administrative overhead is as far as how many accountants, lawyers, general kind of expense that they have that is sharing all programs, versus if they have people being charged directly to a program.

For example, you—the same thing with lawyers. If you have a legal department, usually that is servicing several programs, so you are distributing that cost, whereas you have a direct, say a housing officer, he is being charged direct to that housing program, so he has a direct cost.

Senator COHEN. Well, how do you go about auditing something like this? It's like mercury on a mirror.

Mr. BUELEY. It's not simple, sir.

Senator COHEN. Sliding around from incremental to indirect to administrative and then——

Mr. BUELEY. I think the first thing is that the tribes submit a proposal as to what they consider their direct cost base and what they consider as their indirect pool, the types of things, the costs that are shared for several programs.

Senator **Cohen**. Is there any kind of uniformity within BIA or among the tribes that you can say, for example, insurance premiums are indirect or not indirect? Is there any kind of standardization?

Mr. **Bueley**. As far as the guidelines in the OASC-10, there is, but in a case of, let us say, insurance, if you had general liability insurance, that anybody got hurt on the tribal reservation, maybe that is an indirect type of thing that all the programs are sharing. But if you had an insurance policy that directly related to, let us say, the construction work, housing improvement, that could be charged direct to the housing improvement program.

So those types of guidelines are in there as to how you want to charge your cost.

Senator **Cohen**. Is there any sort of coordination that goes on within the Office of the Inspector General for programs, whether it is Indian Health Service, or Headstart programs, or something, that you have some sort of standard?

Mr. **Bueley**. We are all basically following the standards that were published by HHS and we coordinate with those standards with the other Federal agencies.

Senator **Cohen**. I understand that the tribes attempt to increase the indirect cost rate to collect funds to offset tribal government costs, is that correct? They attempt to increase their indirect cost rate to collect funds to offset other tribal government costs; do tribes do that?

Mr. **Bueley**. I do not know that they are attempting to offset it. I am not quite clear on what that question is.

Senator **Cohen**. What I am getting at is, they have other government costs, is it true that some tribes will attempt to increase their indirect costs in order to offset costs in other program costs? In other words, increasing the indirect costs to get money to put into program costs themselves?

Mr. **Bueley**. Depending on how you classify your costs, you could do that.

Senator **Cohen**. Is that a permissible device to use?

Mr. **Bueley**. Well, in some cases, we may question that it is really an indirect cost versus a direct cost, and in that case we would, in the negotiation process, bring that out, if we really had a concern that they were trying to use the process to get more than they really should. As a matter of fact, we have, in our negotiations on indirect cost, questioned several costs that they then negotiate out before we approve the rate.

Senator **Cohen**. Well, I have some technical questions perhaps I could submit to you for the record, but I need a little more explanation, at least to enlighten me as to how it all works or does not work. There has to be a simple way of accounting that we can develop.

Mr. **Bueley**. There is a good example in the study, the American Law Group, appendix J to that study, that would help explain some of the rationale on how you derive indirect costs.

Senator **Cohen**. Who is prepared to answer some questions on Health and Human Services?

Dr. **Exendine**. I am, Mr. Chairman.

Senator **Cohen**. Would you describe the method that you use in budgeting administrative costs with 638 contracts?

Dr. EXENDINE. We approach it from two different situations. We recently put in a cost accounting system whereby we can actually tell the exact cost of a program—what it costs us to run a program. That is one segment that we use.

Then, from that point on, we use what we call a provisional indirect cost rate until the auditors come along. That becomes the base for that particular program, keeping in mind that at some later date that rate may be adjusted up or down. It is a matter of establishing from experiences what we call base dollar. That, in turn, becomes a portion of our budget justification. Added to that are mandatory costs, which is an inflation factor.

Now, from year to year, until those rates are adjusted up and down, they can pretty well count on that base dollar, which is made up of the provisional indirect cost rate and the money it would cost IHS to actually run a program.

Senator COHEN. And then you have the supplemental dollars on top of that?

Dr. EXENDINE. Supplemental dollars will be added to cover the total cost of the contract, for example, if they have to pay malpractice insurance. I should point out here, and I would like to suggest to the committee, that this problem is made more difficult than it is by terminology. I think terminology is a very difficult thing in this whole process. Interior may be using terminology that is quite different from IHS or which we do not understand. Even within our own system we use different types of terminology, such as "administrative expenses." Some of them call it administrative, some call it indirect costs, some call it overhead, some call it by other terms. Even within IHS we have some difficulty in terminology.

And, I am sure the tribes are confused.

Senator COHEN. I am confused.

Dr. EXENDINE. I, too, am confused at times. But basically, that is what we do. We have a cost accounting system that establishes what the program costs us to run. And it is right down to the very penny. Then on top of that we add any additional cost that the tribe has to incur in and above our program costs.

As I indicated, up until now we have been able to meet those requirements.

Senator COHEN. And you anticipate, with the supplemental funding as it is, and projected, you will be able to continue that in the future?

Dr. EXENDINE. I would say we are probably going to be hard pressed down the line to meet additional costs, because we foresee additional tribes coming in. We are going to be hard pressed in the future, yes, sir.

Senator COHEN. How soon in the future?

Dr. EXENDINE. Well, I would say that within the next year or so, we would probably have some difficulty meeting any kind of increases that are necessary because of tribes taking on additional programs above what they are running now.

Senator COHEN. So what is the consequence of that when you come into that squeeze? What happens?

Dr. EXENDINE. I think when it comes to that particular time, it is going to be a matter of sitting down with the tribes and determining what they want to do, what services they really want to run, where they may want to cut back.

Now, I know it is a very difficult situation, but I think it will be one of negotiating with the tribes and saying, here is the amount of money we have and this is all we have, and making the necessary adjustment.

Senator COHEN. The tribes are aware that there is going to be a reduction in those supplemental funds available to them, why would they not just elect to let BIA continue to run the programs?

Dr. EXENDINE. If I understand your question correctly, and I have not had an opportunity to share this with Mr. Smith, but in my own personal opinion, I think probably one particular agency in this Federal Government ought to have the sole responsibility for dealing with those indirect cost rates or overhead rates that a tribe deals with. I think that is the simplest approach to the whole program. Let the single agency be concerned about the overall financing of the tribal government, the personnel part of it, the contracting part of it, and then when the tribes go to a particular agency to run a program, that agency only has to be concerned with the cost of its program. Let the overhead costs—and I am using the word "overhead" to cover the management and the personnel systems, things like that—be funded by the single agency, instead of tribes getting confused. I think it would be the simplest approach to this whole system.

Senator COHEN. Don't you think there is kind of a disincentive right now as they see the handwriting on the wall that there is going to be a reduction in the availability of certain funding for these purposes, that they would just say, let us let BIA continue to operate?

Dr. EXENDINE. I think in some cases we are going to see that down the line; because their buying power actually is being reduced; because the mandatory cost increases experienced over the years are not meeting inflationary costs. I think the tribes' buying power is lessened and as a result probably in some cases they will elect to retrocede those programs to IHS.

Senator COHEN. Staff is just reminding me that what you are recommending fits precisely into S. 1088, dealing with the tribal control.

Dr. EXENDINE. Let me point out, Mr. Chairman, that that is my own personal opinion and does not reflect the Department of Health and Human Services.

Senator COHEN. But it should, I guess. Let me come back to the Secretarial level of funding being determined for the first year of a contract. How do you determine that?

Dr. EXENDINE. We utilize our cost-accounting system. In our cost-accounting system we can identify very clearly what that program costs us. It is a computerized system that very clearly spells out what it costs us to run that program and then on top of that we add provisional rates to that particular program. That becomes their base dollar. However, when they get audited, that base may be audited somewhat up or down.

After we enter into a 638 contract, we have moved those funds, with the exception of $2.6 million, over into the hospitals and clinics activity. Therefore, when we go forward with the budget, the tribes experience the same increases that Indian Health Service experiences, and we did that because in the earlier years the tribes did not experience those increases as we did.

When we go up, they get their share of it. When we go down, they experience the same thing.

Senator COHEN. That includes pay raises?

Dr. EXENDINE. Yes, sir, it includes pay raises.

Senator COHEN. Could you tell me what kind of interaction you have with the Interior, Office of the Inspector General, concerning indirect costs?

Dr. EXENDINE. In the area program offices we do a great deal of discussions with them as far as the negotiation of rates. Now, I would like to have Mr. Wolfe, from the Office of the Secretary, address that particular question.

Mr. WOLFE. Mr. Chairman, the Department of the Interior negotiates most of the indirect cost rates for the Indian tribes. Last year we negotiated 18 rates. The Department of the Interior negotiated roughly 105 rates, they tell me.

When Interior negotiates a rate, and our program people have a problem with that rate, feeling that it is too high or there is something that they feel is wrong with the rate, they will contact my office, or our negotiators in the regions and we will work together to resolve these problems.

We may find that there are costs in there that are included in the indirect cost rate, that our program, several programs that are used by the Indians, do not use this type of indirect cost.

I or the people who work in our regions would contact the Bureau of Indian Affairs' negotiator or auditor and ask that they look into this matter and in the future these type costs be adjusted up or down to satisfy our programs.

We do coordinate—they have the cognizant for most of the rates. We have the cognizant for a few tribes. We try to work together on common problems that we have in developing and approving indirect costs.

Senator COHEN. One of the things I was suggesting a moment ago was that there has been some suggestion that tribal governments inflate their administrative costs under 638 contracts in order to achieve funding for their tribal costs itself. Are you familiar with that?

Dr. EXENDINE. Yes, I am. I am somewhat familiar with it. Probably the most recent experience the tribes have had is the CETA program. CETA did not permit any indirect costs. There are some State programs along the same line. And, say for example, the tribe is running a number of programs for IHS, the Bureau, CETA, and the State, where indirect costs have not been allowed by CETA or the State programs—but in some cases the tribes have probably tried to recapture their indirect expenses. But I would have to point out the fact that it is not allowable. In other words, we cannot pick up the indirect costs of the CETA program or the State programs that do not allow indirect costs.

Nevertheless, the tribes do incur these expenses.

Senator COHEN. Is there a better way of doing it, having some sort of outright expenditure, direct mechanism, rather than through 638?

Dr. EXENDINE. I think again I would have to refer back to my personal opinion. I think one agency should be able to cover the overhead costs for tribal government management. The tribe would then have a particular pool of dollars available. So that agency, from that point on, could budget in subsequent years in order to offset any shortages tribes may have. I think the single agency would be able to calculate pretty accurately what the tribes may or may not incur in the forthcoming years and then, they could probably budget for x number of dollars to offset those kinds of problems. It is a problem with tribes, yes, sir.

Senator COHEN. One final question. I am told that you are having some kind of budget problem with a $9.3 million shortfall in clinical services and an $18.2 million shortfall needed for Federal pay raises. Is that correct?

Dr. EXENDINE. Yes, we are.

Senator COHEN. And how are these shortfalls affecting the 638 contracts?

Dr. EXENDINE. To date, as far as we are concerned, only the $18.1 million would affect the tribal contracts because they share in that $18.1 million, because it is a portion of our hospital and clinic budget category.

Now, if we obtain that $18.1 million, the tribes will share in it and may use it for pay increases for their own employees.

Senator COHEN. Is Mr. Baron here? Would you come up? Do you have any recommendations on dealing with the issues that we are talking about here, dealing with the indirect costs, contract support, the dilemma that we are having?

Mr. BARON. It is hard to know what piece of the problem we are dealing with. We have made recommendations from our office previously and to simplify it, I think one aspect of the problem deals with how BIA delivers the financial support to the tribes, which is having a separate category called contract support. We have taken the position that this delivery mechanism has created some adverse motivations and was not entirely equitable because it really did not accomplish what it intended to do. We have recommended that the contract support category be eliminated and that the funding be merged with the basic program dollar which is the approach that Indian Health Service has gone to, and the approach that was recommended in the recent study conducted by the American Indian Law Center, and which Secretary Smith has previously endorsed to you.

Senator COHEN. Do you agree with the recommendation?

Mr. BARON. Yes. I agree with that recommendation entirely. It is fully consistent with what we have recommended.

Now, there is the broader, government-wide problem of the indirect cost process, if you care to use that, and its applicability to Indian tribes. It works for the large tribes who have a substantial amount of independent resources, such as Navajo, Warm Springs, or any one with—now they are getting into energy, oil and gas. But it does not work effectively for those tribes, those Indian communities with contract schools, with consortiums, who are substantially dependent upon the Federal dollar. It is just not a very good way of going about it.

The rules and regulations were intended to meet the requirements of State and local government who actually have their own tax base. While the Federal dollar was important, it was not critical. But if you stop to look at an Indian tribe that is 99 percent dependent on the Federal dollar, and something goes wrong, they are immediately in financial trouble, and just about everything can and does go wrong.

We do not have a particular recommendation that we have officially made to address that issue. The IHS gentleman indicated that he would like to see what I perceive is a recommendation for direct funding that would just decide what a tribe ought to have and have one Federal agency give it to them and be over and done with it. That is one approach. It certainly would work for a small tribe.

Senator COHEN. You were shaking your head, Dr. Exendine.

Dr. EXENDINE. Well, I suggested that but I think in the process perhaps I ought to clarify the statement as made. Instead of just giving it to them, I think there ought to be negotiation as to what they are entitled to, and let that agency fund them directly. Negotiation, I think, is critical.

Mr. BARON. Naturally. We have tried to get something like that going for the contract schools. Unfortunately, we again run into this participation by other Federal agencies and the fact that no one Federal agency appears to be totally responsible for financing what you might call administrative costs of contract schools. But by and large I think we are pretty close there. We have worked out some clandestine, to use the expression, arrangements with some small tribes who have, on their own initiative, have expressed an interest toward that.

I might add that when we are dealing strictly with Indian Health Service we generally are successful if those are the—the BIA and Indian Health Service—are the funding agencies predominantly, but the more we proliferate, the more difficult it is to get everybody together because everybody has their own rules and regulations and generally what we propose violates a bunch of them. So that has not been a good approach so far. We have just had success in very limited cases.

So, I do not have a panacea solution to the problem. I think we can solve the contract school problem but I just do not know, short of moving to a different mechanism, I just cannot see using the indirect costs avenue as being very responsive to the needs of those Indian organizations which are totally dependent or substantially dependent on the Federal dollar.

We are either going to have tribal government or we are not and someone has to pay for it, and if they do not have any money, there is only one option left and that is the Federal Government.

Senator COHEN. Thank you very much. I appreciate your coming forward because it is a very complicated area, and we do want to try and move, and the tribes themselves want to move, into an area of self-determination and more tribally controlled operations as opposed to breaking this link between BIA and the tribes themselves.

Two primary concerns, it seems to me, came out of the testimony this morning, and one was the question as to whether the tribes will continue to have access to GSA, and it has been very helpful to have your comments on that. The second is the need to somehow have one agency consolidating these functions and perhaps having some more uniformity than we currently have. I think both of those two points are critical.

Mr. SMITH. Mr. Chairman, I just might reemphasize, I know this was brought out this morning, about helping the small tribe that has to depend 100 percent on Federal funds, and hopefully we have opened a door if we get an approved budget with our small tribes initiative to help some of the small tribes to build that small core of administrative capability.

Senator COHEN. Thank you very much.

Our second panel consists of Mr. Gordon Thayer, Maxine Edmo, Edward Little, and Ron Andrade.

Mr. Thayer, would you care to proceed?

STATEMENT OF GORDON THAYER, CHAIRMAN, GOVERNING BOARD, LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWAS, HAYWARD, WIS., ACCOMPANIED BY BILL CADOTTE, TRIBAL CONTRACTS OFFICER

Mr. THAYER. Senator Cohen, my name is Gordon Thayer. I am chairman of the Lake Superior Band of Chippewa Indians in Wisconsin. With me is Bill Cadotte. He is the tribal contracts officer for our tribe and is responsible primarily for dealing with our problems of indirect cost.

Historically our tribe has been plagued with the inadequacies of the indirect costs formula and how it is applied to Indian tribes and specifically to the Lac Courte Oreilles.

Just briefly, before I get into the actual testimony itself, our tribe had to utilize judgment claims funds in the amount of $450,000 to offset and to administer grants and contracts. We feel that this was a dire emergency. We had to utilize these judgment claims to keep the tribe afloat. Had we not used them, we would have been in financial chaos, and I am hoping and I am very pleased that this committee is addressing this problem so that next year or the year after our tribe does not become involved in having these judgment claims. We do not have too much left in that respect.

I am going to be as brief as possible in relating the difficulties we have experienced since 1979 with the recovery of indirect costs associated with contracting of BIA programs under Public Law 93–638.

As we started to contract for BIA programs under Public Law 93–638, we found that where there were a number of services that had to provide contracts in order to insure compliance and accountability as conditions of contracting. We found it necessary to expand our administration from five employees, four in accounting and one in data processing, to 30, an increase of 600 percent. This increase partially covered the policymaking body; the separation of function within accounting; the increased demand upon data processing; the need for personal services on behalf of the employees; costs associated with space, maintenance, heat, et cetera; secretarial and technical assistance; as well as compliance monitoring.

The under recovery of these administrative costs and the BIA policy error of providing contract-support funds to the tribe by indirect cost rate nearly drove us into receivership.

During fiscal year 1979, we had a provisional indirect cost rate of 27 percent applied to BIA contracts at 90 percent of the proposed expenses submitted to the Office of the Inspector General. As it turned out, we were finally assessed with an approved rate of 7.6 percent which created two major problems.

First, for those BIA contracts which we were recovering costs at a rate of 27 percent, we found ourselves in a position of over recovery in the approximate amount of $89,000. The difference between 27 percent and 7.6 percent.

Second, we were unable to collect indirect costs from several contracts that were included in the listing of all contracts, or the base, for calculating the actual rate. We utilized lines of credit to fund tribal administration in anticipation that indirect costs would be forthcoming. That did not materialize and we were indebted in the amount of $206,000, plus $89,000 in contract payback for over recovery of the approved rate on specified BIA contracts.

Fiscal year 1980 repeated the pattern of having a provisional rate granted by the BIA, which was higher than the approved rate granted by the Office of Inspector General. The difference was that this time the over recovery was in the amount of $71,000 and the under recovery was in the amount of $333,000, a 2-year total of $160,000 for contract payback and $539,000 indebtedness at our local banking institution.

During fiscal year 1980, we began documenting those Federal departments that could not pay the full indirect cost rate as approved by the Office of Inspector General and requested assistance in resolving the dilemma we found ourselves in. As the documentation developed, we submitted our proposal for fiscal year 1981 at a rate of 28.2 percent and held our recovery of cost well below that rate to avoid the over recovery situation we had previously experienced with the provisional rate granted by the Bureau of Indian Affairs. This worked as we did not over recover on any contract during fiscal year 1981.

The Office of Inspector General then approved our rate of recovery at 28.2 percent, yet we found that a substantial number of contracts did not have the capability to pay the full rate either because of inadequate appropriations or because of legislated limitations as in Department of Education training grants. The Federal Register dated Thursday, April 3, 1980, part 100a.652, specifically limits the rate of indirect cost recovery to 8 percent for training grants. That statement is as follows:

> (a) The appropriate official of the education division may approve an indirect cost rate for an educational training project at the lesser of: (1) The actual indirect cost rate of the grantee; or (2) 8 percent of the total direct cost of the project.

Recognizing the impossibility of this situation, we requested that our rate for fiscal year be renegotiated to 17.7 percent, reducing our administrative staff and freezing other administrative expense as much as possible and still be able to deliver the effort necessary to insure compliance and accountability. The net result was that we still under-recovered our expense and went in debt an additional $218,000 for fiscal year 1981.

The totals now stand at $160,000 due contracts for over-recovery and $757,000 due to under-recovery of the approved rate. We were then forced to request special legislation to offset a portion of this indebtedness by utilizing 20 percent of our land judgment claims, which amounted to $450,000, to prevent foreclosure such that we could continue to provide goods and services as dictated by various grants and contracts without going into receivership. This fiscal year, we proposed a unique system that was acceptable to the Office of Inspector General which dealt with the problem of under-recovery. We have dealt procedurally with the problem of contract over-recovery in fiscal year 1979 and 1980, and do not expect this particular problem to resurface.

The proposed unique system, named Lump Sum-Indirect Cost Hybrid, allows the tribe to fully recover administrative costs by isolating those contracts or grants that do not have the capability to honor the full indirect cost rate. It then becomes necessary to reduce services by indirect cost staff such that those contracts or grants that fully honor the approved rate do not pay a disproportionate amount for the same services. OASC-10, "A Guide for State and Local Government Agencies," in December 1976 states:

> When the maximum amount of costs allowable under a statutory limitation or the terms of an agreement in less than the amount otherwise allocable to the agreement under FMC-74-4, the amount not recoverable may not be shifted to other federally funded programs.

The Office of Inspector General translates this to mean that for all contracts and grants in the base, the tribe is obligated to collect and spend the full indirect cost amount, creating a situation where tribal lines of credit has to be utilized to support those contracts that did not honor the full indirect cost rate or face the possibility of a negative carry-forward adjustment to a future rate. The end result of that situation is a complete disruption of cash flow as the tribe would be expected to carry on administrative functions without any recovery of cost whatsoever.

The presumption of OASC-10, titled "A Guide for State and local Governmental Agencies," is that for governmental agencies the taking on of contracts and grants with legislative limitations is supportive of governmental operations and that through the power of taxation can support the differences between the approved indirect cost rate and the limited rate, a commitment. For our tribe, this is not possible because we do not have that authority. Consequently, we accepted programs with rate limitations without being fully cognizant of the long-range indebtedness they would cause. We do not have sufficient marketable natural resources or the power of taxation to produce independent revenue to make up these differences.

We are, for all practical purposes, totally dependent upon Federal mechanisms for the recovery of costs to maintain a suitable administration to insure contract or grant compliance and accountability.

There are basically four Federal methods available to the tribes for the recovery of administrative costs. I will mention these four areas and these methods are further illustrated in written testimony. No. 1 is indirect cost; No. 2, predetermined fixed rates for indirect costs; No. 3, negotiated lump sum for overhead; and, No. 4, cost allocation plans.

The first mechanism, indirect cost, has the flexibility to increase or decrease administrative costs to meet the needs of contracts, yet the carry forward adjustments are structured such that the difference between the approved rate and actual expense for tribes is usually negatively adjusted in a future rate or tribal independent revenues must be used to correct the cash deficiency.

The second mechanism, predetermined fixed rate for indirect costs, holds that if a governmental entity has relatively fixed administrative cost and relatively fixed contract and grant activity level, based on past experience, the fixed rate could be utilized. For our tribe, this is not a consideration because our administrative costs have recently approached consistency and contract/grant activity is in a constant state of flux. With all the cutbacks in programs and the BIA operating on continuing resolutions until well within the fiscal year, we do not have adequate information as to what our grant and contract activity will be in any given fiscal year.

The third mechanism, negotiated lump sum for overhead, fixes administrative cost for each Federal department having a relationship with the tribe. The level of effort needed to negotiate a fixed expense level to be assessed each agency within each Federal department is currently beyond our present staffing patterns in view of the ever changing level of grant activity within a given year.

The fourth mechanism, cost allocation plans, provide for the distribution of administrative costs on a monthly basis for each contract and grant that is in effect for that month. Although this is a sound mechanism for the recovery of tribal administrative expense, the mechanism assumes that tribal accounting and data processing systems are fully developed and operational. We initiated the acquisition of computer hardware, yet we found that we must increase the capability of the computer and further develop software that will meet all the requirements set forth by Federal agencies to adequately apply compliance controls as well as providing accurate and dependable data.

This year we set down certain criteria by which we attempted to select the best possible mechanism with respect to our present staff and equipment capabilities. They are as follows: No. 1, that Federal programs require a sound tribal administrative system; No. 2, that we must recover all of our administrative costs from State and Federal programs; and No. 3, that the selected mechanisms stabilized tribal administration with respect to legislative limitations.

We found that none of the designated systems by themselves could satisfy this criteria. We did find a short-term solution in title 25, Code of Federal Regulations. This is Negotiated Lump Sum for Overhead which stated that negotiated amounts:

> In lieu of Indirect Cost will be treated as an offset to total indirect expenses of a grantee department before allocation to remaining activities. The base of which such remaining expenses are allocated should be approximately adjusted.

This, in conjunction with OASC-10 which maintains equity in terms of administrative effort, was the basis for the proposed hybrid system which invoked both the indirect cost mechanism for the recovery of administrative costs and the negotiated lump sum mechanism for said recovery.

The weakness of this hybrid system is that the BIA, through the contract support appropriation, must allow for full recovery against all BIA contracts and grants. This affects considerable concern, primarily because in this fiscal year we have experimented the fear that the BIA would not receive adequate appropriations to cover full indirect costs as approved by the Office of Inspector General. If that occurs, we will find our tribe once again facing severe under recovery problems and possibilities of negative carry-forward adjustments or demands upon already strained lines of credit.

This hybrid system is by no means the answer to stabilizing tribal government. It is only a short-term solution design to prevent under recoveries and negative carry-forward adjustments. With that in mind, we would like to propose the following recommendations for your consideration:

No. 1, that the BIA forgive all over recoveries, $160,000, due to provisional rates utilized in fiscal years 1979 and 1980.

No. 2, that the BIA provide funds for all under recoveries due to indirect rates for fiscal years 1979, 1980, and 1981, for a total of $757,000. It should be noted that we had to have special legislation passed to use judgments for land claims and lines of credit to support Federal indirect costs associated with contracting under Public Law 93–638.

No. 3, that the BIA contract directly with tribes for tribal administration such that we can abandon the use of the four available Federal mechanisms to recover administrative costs. This would place the burden of acquisition of adequate funds for tribal administration with the technically qualified, experienced staff of the Bureau of Indian Affairs administration.

No. 4, that the BIA utilize contract support funds for startup costs associated with the contracting of BIA programs and other one-time costs to tribes already contracting under Public Law 93–638, such as outlined development and compliance with pending administrative requirements for grants in aid to State, tribal, and local governments. Circular A–102 revised.

We feel that these recommendations are valid with respect to the trust responsibility of the Bureau of Indian Affairs, would have the net result of stabilizing tribal governments, and are consistent with the third stated objective submitted by Assistant Secretary Kenneth Smith and accepted by Interior Secretary Watt on November 18, 1981. That stated objective is as follows:

> To continue the efforts to promote and encourage strengthening of tribal government structure and tribal management capabilities to utilize the abilities and the independent freedom of the Indian people.

Thank you very much.

Senator COHEN. Thank you very much, Mr. Thayer. Without objection, your briefing document will be made a part of the record of this hearing.

[The briefing document follows. Testimony resumes on p. 93.]

Briefing Document Outline: Accummulated Cash - Shortfall of The

LAC COURTE OREILLES TRIBAL GOVERNMENT

For Fiscal Years Ending 9/30/81

LAC COURTE OREILLES
TRIBAL GOVERNMENT

Discussion Outline

A. Key facts regarding the Lac Courte Oreilles Tribe		
1. Brief history of the tribe	Exhibit I	
2. Organization Chart	Exhibit II	
B. Tribal enterprise activities - Summary		
1. Description of tribal enterprises	Exhibit III	
2. Fiscal 1981 statement of revenue and expenditures for tribal enterprises	Exhibit IV	
C. Current financial statements as of Sept. 30, 1981		
1. Tribal general fund liabilities as of 9/30/81	Exhibit V	
2. Tribal balance sheet as of 9/30/81	Exhibit VI	
3. Summary of fiscal 1981-2 grant activity	Exhibit VII	
D. Current tribal indirect cost status		
1. Example of indirect cost as applied to tribes	Exhibit VIII	
2. History of shortfalls in indirect cost funding	Exhibit IX	
3. Reduction in indirect expenditures	Exhibit X	
E. Change in banking practice affecting the tribe as of January 1, 1982		
1. Letter from F.D.I.C.	Exhibit XI	E
F. Alternate ways of handling current cash situation		
1. Borrowing		
a. Short term loan		
b. long term loan		
2. Reduction of the LCO indirect cost budget		
3. Challenge F.D.I.C. - possible litegation		
4. Cash-flow impact of alternatives		
G. Approaches to handling the long-term cash situation(s)		
1. Less dependency on indirect cost funding		
2. Economic development producing more net income		
3. Tribal assets sold to others/used more effectively		
4. Use of tribal endowments/settlements	Exhibit XII	G
5. Use of tribal regulations/taxation to generate revenue		
6. Adequate governmental funding for program administrative costs		
H. Summary and recommendations		
1. Probable impact of not solving this problem	Exhibit XIII	H
2. Governmental remedies		
a. Forgiveness for overrecovery on indirect monies		
b. Repayment for shortfall of indirect monies		
c. Fully fund indirect cost for fiscal '81 (retroactive)		
d. Fully fund indirect cost for fiscal '82	Exhibit XIV	
3. Interim assistance provided by a working capital loan	Exhibit XV	
4. Suggested revision to the indirect cost reimbursement funding approach	Exhibit XVI	
5. Tribal Resolution		

Exhibit I.1

LAC COURTE OREILLES
TRIBAL GOVERNMENT

BRIEF HISTORY OF THE TRIBE

A prominent component of the Lake Superior Chippewa Tribe, the Lac Courte Oreilles Band is a signatory to the 1837, 1842 and 1854 Treaties with the United States Government. The latter treaty designated three townships (108 square miles) to be set aside as the Lac Courte Oreilles' "Reserve Tract". By 1873 the Reservation boundaries has been established by the President of the United States and the "allottment" process of parceling out 80 acres to each Tribal Member (full-bloods) began. By 1900 and continuing into the 1950's, Tribal Members were permitted, and often encouraged, to either sell their land or have it put into non-trust status, which usually resulted in the land being permenently out of Tribal or Tribal Member Ownership. This resulted in the all too frequent "checker-board" pattern of land ownership within the Lac Courte Oreilles Reservation as has happened on most other Reservations.

Shortly after 1934 most American Indian Tribes reorganized themselves pursuant to the Indian Reorganization Act of that year. Lac Courte Oreilles had a "Business Committee" of its members handling the few minor administrative matters of the Tribe, but it did not have a constitution, as such.

The major accomplishment of the Business Committee of that era, 40's and 50's, was the construction of a Cranberry Marsh in 1949. Other than that project, most "Tribal" functions were cultural and social in nature, with legal, jurisdictional and governmental services handled through the Bureau of Indian Affairs. Most of the funding of the Cranberry Marsh, for example, came through the BIA.

By the mid 60's, however, the seeds of change were being sown and cultivated, primarily by Tribal Members returning home to live the "better life". With them they brought new, independent ideas and the experience and motivation to follow-through with the recently-coined phrases of self-determination, self-sufficiency and self-government. With them they also

Exhibit I.2

brought their analytical eyes which saw critucal needs of the Tribe for better housing, education, health, and employment opportunities - all needs best met by the Tribe, for the Tribe, rather than being imposed upon the Tribe without regard for Tribal history, culture and goals.

The first step was the adoption of a Tribal Constitution (and By-Laws) in November, 1966. Therewith, the Tribal Governing Board was formed and a Tribal Housing Authority was established the following year. A Housing Project was initiated and by 1973 the first, of many units to come (over the next decade), was complete.

Simultaneously, with the advent of HUD Housing, the Tribe formed a construction company. This was to evolve into a viable enterprise, but such took years of training, experience and re-organization first.

Thereupon, Tribal Government Development progressed, almost at a break-neck pace. The Tribal Governing Board began contracting with the BIA and other agencies. Grant applications were initiated for a number of programs and projects. Tribal jurisdiction was asserted. Over-all Economic Development Planning was started. Control over Tribal resources was begun. Educational needs of the Tribe were studied and addressed. Health programs were obtained for the Tribe.

Tangible results of the foregoing can be reported as facts. We are proud of our accomplishments to date and in the offing.

In 1975 plans were carefully made and funding secured to operate a Tribal School System, particularly to advance the level of achievement of Tribal students, to combat truancy and adjustment problems, to provide a genuine cultural component and atmosphere and to meet the special education needs of Indian students. A commercial building in our New Post community was remodeled and added on to during 1975-1976 and has become our elementary school. In 1978 a now high school building was constructed with E.D.A.

Exhibit I.3

funds ($800,000) and dedicated that summer. Head Start programming began as a summer project in 1968, became full-fledged in 1970 and since 1977, has been an ever-expanding educational program in our new Tribal Office Building (completed in Jan., 1977 with HUD C.D.B.G. funding). Day Care, as a complete educational component, was realized in 1980, having been initiated in 1977. The latest in technical advances are used in innovative ways in all levels of the school curriculum. A low teacher-student ratio results in personal attention and subsequent growth and achievement. Special education counselors and teachers assist each student and their families. A college is in the plans to take off from our present higher education and vocational education efforts.

Health and Social Service programs have always been and continue to be developed as high priority services. Within the new Tribal Office Building is a medical and dental out-patient clinic facility. Funding from BIA and IHS has assisted in the development of a Health Department to meet community health as well as health education needs. Alcohol and drug abuse programs are being addressed at every level - home, school and at work.

Reverence for and protective management of our wildlife led to the establishment of our Tribal Conservation Department in 1975. A conservation code, and Tribal Court code, was correspondingly enacted. Our highly qualified, will-trained, experienced Conservation Department is ready for routine as well as new and extended duty.

In 1976, legislation was passed in Congress returning over 13,000 acres of F.S.A. lands within and adjoining the Reservation to the Tribe. This increased our Tribal land base significantly so that our Reservation ownership "checker-board" pattern is as follows today:

EXHIBIT I.4

17,310	Acres of Tribal Lands - In Trust For the Tribe
26,185	Acres of Allotted lands - In Trust For Lac Courte Oreilles Individuals
26,220	Acres of Non-Indian Owned Land
6,144	Acres of Waters, Marsh, etc.
75,859	Acres Within Reservation

A substantial number of acres within the Reservation, approximately 3000, was acquired for the Chippewa Flowage Power Commission Project No. 108 prior to 1921. We are seeking the return thereof through administrative, legal and legislative means. Said project represents a major set-back for the Tribe which has yet to return any benefits to our Members. Damages to the Tribe associated with said project have yet to be litigated.

The population trend of Tribal Members began in the 60's has continued unabated to the present. In 1970 there were less than 700. Today there are almost 1800 Tribal Members residing on or near the Reservation; there are over 2500 Members living within a 100 mile radius of the Reservation. This in turn has resulted in a tremendous need for housing. Currently we have the following HUD Project(s) units:

	HUD 54-1	29 Units	(Including 4 units for elderly)
	" 54-2	55 Units	
	" 54-3	15 Units	(Including 15 for elderly)
	" 54-4	55 Units	(Including 7 for elderly)
	" 54-5	55 Units	(Inclucing 8 for elderly)
Approved	" 54-6	25 Units	(Not yet Under Construction)
Under Construction	" 54-7	41 Units	(Including 8 Units for elderly)
By 12/31/83		257 Units	will be Under Management of the L.C.O. Housing Authority

Although this looks impressive and we are proud of our new housing, we still have many applicants who have real needs for adequate housing. Unfortunately, economic governmental forecasts show nothing on the horizon in the way of future HUD projects. As an adjunct over the past 10-12 years over 250 older homes have been partially re-modeled and weatherized by BIA and other funds.

Exhibit I.5

Employment figures of the Tribe show a seasonal high, October, 1981, of about 350. This is not reflective of the over 50% unemployment rate on the Reservation, as compared to the county figures of about 12%. Economic opportunies are being constantly explored. While we have an eye out for the large company to put in a good-size, economically sound plant, our approach has narrowed down to forming Tribal enterprises to provide jobs, goods and services and ultimately revenues to help sustain Tribal Government. That, however, is "down the road aways."

Lac Courte Oreilles participates on the regional level as a member of the Great Lakes Inter-Tribal Council, the Inter-State Indian Assembly; Nationally we are members of National Tribal Chairmens Association and the National Congress of American Indians. Our leaders have spoken in Congress, have addressed the public frequently through the media and are conversant with legislators and governmental people at all levels. Our educators have national prominence and our construction company was recently given special commendation by HUD.

Exhibit II

LAC COURTE OREILLES TRIBAL MEMBERS

TRIBAL GOVERNING BOARD

Special Appointments

- Court Judge
- Election Officials
- Honor the Earth Foundation
- Human Services Committee
- Special Events
  - Cultural
  - Historical

Special Boards Committee

- Elderly Commission
- Health Board
- Housing Authority
- Membership Committee
- Personnel Committee
- Private Industry Council
- Public Broadcasting Corp.

Central Administration

- Accounting Dept.
- Clerical/Secretarial Staff
- Contract Officers
- Custodial Staff
- Enrollment Dept.
- Legal Dept.
- Personnel Dept.
- Planning Dept.
- Public Relations

Contract/Grant Funded Programs

- Conservation Dept.
  - Fire Control
  - Law Enforcement
  - Safety
  - Security
- Court
- Education Dept.
  - PreSchool/Early Ed.
  - Elementary School
  - High School
  - Adult Education
  - Higher Education
  - Vocation Ed.
  - Alternate Ed.
  - Teacher Training
  - Special Ed.
- Health Dept.
  - Medical Clinic
  - Dental Clinic
  - Community Health
  - Alcohol/Drug Abuse
  - WIC/MCH
- Housing Improvement/Weatherization/Water and Sewer
- Recreation Programs
- Social Services
  - Elderly Programs
  - Youth Programs
  - Food Services
  - Child Welfare
  - ENIP
  - Elderly and Handicapped Transportation Program

Enterprises-Corporation Boards

- Commercial Center
  - Supermarket
  - Variety Store
  - Service Station
- Cranberry Marsh
- Development Corp.
  - Construction
  - Gen. Contracting
- Forest Products
  - Harvesting
  - Hauling
- Games
  - Bingo
  - Roller Skating
- Graphic Arts
  - Printing
  - Duplicating
  - Layout/Design
- PROPOSED
  - Fish Hatchery
  - Historical Village
  - Sand/Gravel/Concrete Co.
  - Wild Rice Production

EXHIBIT III,1

LAC COURTE OREILLES

TRIBAL ENTERPRISE ACTIVITIES DESCRIBED

1. Commercial Center

Little more than a dream for 10 years, the Tribe wanted a convenient, reasonably priced, nice place for its members and surrounding public to shop for groceries and basics. Planning evolved through various phases with a feasibility study verifying we were on the right track with a "mini-mall" concept at the right cross-roads within the Reservation. Because of the vagaries of funding, development in stages has occurred with Phase I complete and Phase II under construction. Phase I consists of a 16,684 square foot one-story commercial building housing a complete grocery store (LCO Fairway), LOC Variety store, and two rental stores -a restaurant and a folk arts shop. Phase II will be a 6,000 square foot building for a full service station and our Conservation Department. The Grocery and Variety stores have been operating for 12 weeks, with total gross sales for the period $50,000 over projections. Financing was as follows:

EDA Grant	$ 15,000.00
HUD CDBG	315,000.00
BIA Loan	500,000.00
Revenue Sharing	20,000.00
TOTAL	$1,350,000.00

Builders and general contractor: Lac Courte Oreilles Development Corporation.

Two more phases are being planned, including a post office, credit union, service business' and more stores. The entity responsibility for this enterprise activity is the Lac Courte Oreilles Commercial Center, Inc., a corporation formed by the Tribal Governing Board which issued its Articles of Incorporation on November 12, 1979.

2. Cranberry Production

Our first and oldest Tribal enterprise, the Cranberry Marsh located adjacent to the Chippewa Flowage in our Chief Lake community, was started from scratch in 1949 and enjoyed continuous, but modest, success until the mid 70's. Several lacks - modern equipment, new methods, proper management and adequate financing - contributed to crop failures and no harvesting in 1977 and 1978.

EXHIBIT III,2

2. Cranberry Production (cont.)

Although a fair sized marsh, the production capabilites had not been nearly realized. In 1978 the Tribal Governing Board obtained funding and management assistance from the regional community development Corporation, Impact-Seven. A separate corporation was formed, an experienced manager was hired and sufficient capital was made available - up to $100,000. An unexpected successful harvest in 1979 grossed $99,678.53 in revenue from sales and 1980 followed with $73,155.45. 1981 harvest projections exceed $100,000*. After the 1982 harvest the marsh (and corporation) will be transferred to the Tribe accompanied by the new marsh manager, a tribal member, and profits from the four years' harvests.

---

* With the total of capital improvements and operating/administrative expenses projected at $65,000 for 1981, a pre-tax profit of $35,000 could be realized. Currently the entity responsible is a Wisconsin For-Profit Corporation with a five (5) man board of Directors - 3 from Impact-Seven, 2 from Lac Courte Oreilles. Upon return to the Tribe, a Tribal Corporation will be formed to take over responsibility. The present corporation name is: LCO Cranberry Producers, Inc.

3. Construction Company

We feel we are justifiably proud of our general contracting and construction firm: The Lac Courte Oreilles Development Corporation, a Tribal Corporation as of March 10, 1980, being a Wisconsin not-for-profit corporation prior thereto. Originally managed by a 5 - man Board of Directors, it was recently expanded to 7, all tribal members. Initially formed in 1972, the corporation functioned as a sub-contractor under a non-Indian general contractor until 1976, primarily to gain experience and train members. BY general contracting and fully functioning as a complete builder, LCO Development has satisfactorily completed the following projects:

EXHIBIT III,3

3. Construction Company (cont.)

1977	Tribal Office Building	$ 500,000
1978	LCO High School Building	808,000
1980	HUD 54-4, 55 housing units	2,363,462
1981	Commercial Center - Phase I	715,000

The following are under construction at this time:

HUD 54-7, 41 housing units	$2,794,077
Commercial Center - Phase II	200,000
Recreational Center Building	138,500
Graphic Arts Building	50,000

Funding is reserved but to be under contract within 90 days for HUD 54-6, 25 units, $1,850,000

Profitability is just now beginning to be realized, primarily due to strong independant management, assembly-line type construction methods where possible, reasonable wage rates and extremely careful financial management, including very low debt ratio. LCO Development is fully bonded, insured and enjoys an extremely high workmanship evaluation from HUD and EDA, as well as Fm Ha.

4. Forest Products

Facilitated through a Department of Labor training grant in FY 1978, "Logging" operations by the Tribe under the auspices of the Tribal Governing Board have been subject to the vicissitudes of the wood-buying market. Interest rates, housing starts and weather combine to create the traditional "Feast or Famine" climate to which loggers are subject. We are no exception. Besides being physically dangerous and demanding, harvesting and hauling trees requires close co-ordiation with various authorities and businessmen; good equipment in excellant repair is a must.

In short, we must report out Forest Products enterprise, Lac Courte Oreilles Forest Products Corporation, formed as a Tribal corporation in November 12, 1979, is not operating up to expectations. We have not yet found the right combination of employees,

EXHIBIT III,4

(4. Con't)
management and financial support to be able to turn a substantial profit at this time. For FY ending 9/30/81 although gross sales receipts are $88,495, a loss of $279 is reported; also known is that monthly payments on notes payable are in arrears and repossession is being threatened.

While the Tribe does not have a generous abundance of timber, there appears to be a realistic expectation that once the log buying market strengthens under consistent management our Forest Products enterprise can turn a modest profit. We will also be seeking technical assistance from the BIA to provide an analysis of our total situation and to provide a forecast of operating expectations.

5. Games

Bingo and similar games are popular with Indian people - LCO is no exception. Since February, 1979, the Tribal Governing Board has conducted bingo games for its members and the public. Proceeds are used for charitable, educational, cultural/social and other philanthropic purposes. FY 1981 shows a net revenue intake of $40,253, after nightly prizes, etc. Donations, contributions, loans to worthy organizations and individuals totalled $22,912 outstanding.

Recently, through a BIA loan, construction began on a new building to house not only the bingo games but to accomodate roller skating and other recreational activities. The $100,000 loan will be paid back in 5½ years. Complete cash-flow, profit/loss and balance sheets were submitted to and approved by the BIA in conjunction with the loan. The bottom line future of Tribal games looks very good.

Managerially, begun as an informal committee in February, 1979, in November of that year the Tribal Governing Board appointed 13 Tribal Members, mostly women to serve as the "Board of Directors." On July 6, 1981, their structure was formalized into a Tribal

EXHIBIT III,5

enterprise corporation complete with articles of incorporation and a management plan. Their legal name is:

Lac Courte Oreilles Tribal Games Committee

6. Graphic Arts

Begun in 1977 as a small print shop to put out our Tribal newsletter, this operation has grown into a competitive, full-service business. Incorporation, as a Tribal enterprise, on November 12, 1979, Graphic Arts has $35,000 worth of equipment and supplies, which, during FY 1981 produced $54,000 in sales. With its now 4000 square foot building, they project $88,000 in sales for FY 1982, $106,000 for '83 and $125,900 for '84. Considering the growth from $14,574 in 1979, to $43,708 in 1980 and this years $58,226 (plus $10,000 in accounts receivable), we think the growth projections are very reasonable. We expect continued success from this enterprise. Their work is top-notch and they serve both government agencies as well as the private sector. They continue to produce our news - now a many paged monthly - and also most our in-house needs.

7. Failures

We must report the "passing on" of two ventures - a beauty shop which lasted only a few months and a cafeteria for our office building which did not justify continuation as a convenience loss. We discontinued the beauty shop because of lack of business and before a loss occurred. The cafeteria sustained a $3438 loss for FY 1981 and we covered by return and sales of supplies on hand.

8. Proposed

Our Overall Economic Development Plan sets forth a number of proposals for enterprise development of profits. We outline here,

EXHIBIT III,6

(8. Con't)

briefly, three of those plus one more.

a) Fish Hatchery

A full feasibility study done by nationally recognized experts was completed over 4 years ago. The product remains viable, subject to funding. The BIA has shown new interest in this project and we are putting this back on our "laundry list." Up to date costs are being developed

b) Historical, Authentic Chippewa Indian Village

Continued interest in this project demonstrates its potential as a tourist attraction. Authentisity of every detail and a good location will make this an education experience as well. Our plans call for it to be near the Commercial Center. Estimated costs will likely be over $150,000 because of high land acquisition prices.

c) Sand/Gravel/Concrete Company

Since July, 1980, when this concept was expressed by the Development Corporation, two potential sites have been located. Feasibility studies, market evaluations, site examinations, soil borings, equipment analyses, production planning and financial studies must be made. With a component to produce a product - concrete blocks, patio stones, chimneys, etc. - year-round employment will be possible. This can be a vital business to provide capital formation for the Tribe. Estimated capitalization needed: $500,000.

EXHIBIT III,7

d) Wild Rice Production

Prior to 1920, Lac Courte Oreilles produced 25,000 pounds of wild rice per year. It was a staple, one of the subsistence building blocks. While only in the "looking at" phase, particuliarly in connection with the Chippewa Flowage situation, we are highly motivated to restore this commodity to our tables and perhaps to others.

9. Explanations of Accompaning Statement

The following table does not include data as to the Development Corporation and Cranberry Marsh. Separate audits are being prepared. Since the Commercial Center has been under way for only 12 weeks no firm figures are yet available.

As to the items entitled "Tribal Garage and Gas Station", these shall soon be within the Commercial Center's operation as soon as the new building is constructed. The "Smoke Shop" is already combined with and integrated into the Commercial Centers operation.

LAC COURTE OREILLES STATEMENT

EXHIBIT IV

STATEMENT OF REVENUE AND EXPENDITURES FOR TRIBAL ENTERPRISES, OCTOBER 1, 1980 to SEPTEMBER 30, 1981

	Forest Products #5901	Tribal Games #5903	Print Shop #5936	Cafeteria #5923	Beauty Salon #5926	Tribal Garage #5934	Gas Station #5905	Smoke Shop #5920	Memo Total
REVENUES									
Sales-Goods & Services	$88,495	$40,253	$54,171	$7,626		$ 7,388	$124,123	$26,045	$348,101
Equipment Rental									
Other-Accounts Receivable		21,083							21,083
TOTAL REVENUE	88,495	61,336	54,171	7,626		7,388	124,123	26,045	369,184
EXPENDITURES									
Employee Compensation	8,297		30,396			15,939	4,588		59,220
Fringe Benefits	1,087		3,602			2,419	632		7,740
Equipment Purchases	5,750	8,619					175	150	14,694
Travel & Per Diem	163	880	4,687	177			2,667		8,574
Supplies	374	16,833	14,733	10,536		1,977	109,472	17,348	171,273
Equip. Repairs & Mnt	980		265	64					1,309
Rent, Comm., & Util.			1,848	287		801	51		2,987
Contract Services	35,135								35,134
Tech. Asst. & Trng.									
Other	225	22,912					56	1,087	24,280
Stumpage	15,101								15,101
Notes Payable	21,662		1,610					2,129	25,401
TOTAL EXPENDITURES	$88,774	$49,244	$57,141	$11,064		$21,136	$117,641	$20,174	$365,714
REVENUE OVER EXPENDITURES	(279)	12,092	(2,970)	(3,438)		(13,748)	6,482	5,331	3,470

BEST COPY AVAILABLE

Exhibit V

Lac Courte Oreilles
Tribal Government

Summary of General Fund Cash Register

		As of September 20,1981 (Deficit)
General Fund - Bank Balance		$(493,487)
Accounts Receivable from other funds		116,000
Less:		
Payroll Liabilities	(37,600)	
Payable to Other Funds	(241,200)	
Notes Payable - Short Term	(21,300)	
Notes Payable - Long Term	(20,210)	
		(320,310)
Net Cash Position		(697,797)
Less:		
Potential Prior Years Indirect Cost Over Recovery Laibility		(160,090)
Cash Position		$(857,887)

Exhibit VI

LAC COURTE OREILLES TRIBAL GOVERNMENT

BALANCE SHEET AS OF SEPTEMBER 30, 1981

DESCRIPTION	HEALTH	EDUCATION	B.I.A.	D.O.L.	ADMIN. SUPPORT	SOCIAL SERVICES	CONSTRUCTION PROJECTS	TRIBAL ENTERPRISES	MULTI YEAR PROGRAMS	GENERAL FUNDS		FUND TOTAL
										OPERATIONS	PROPERTY	
ASSETS												
CASH	$[12,800]	$404,500	$49,500	$8,500	$25,600	$13,200	$2,800	$19,700	$42,400	[493,500]		$59,900
NOTES RECEIVABLE												
EMPLOYEE RECEIVABLE												
RECEIVABLE FR. OTHER FUNDS		142,100	99,000					16,100		116,000		373,200
TOTAL CURRENT	[12,800	546,600	148,500	8,500	25,600	13,200	2,800	35,800	42,400	[377,500]		433,100
PROPERTY:												
LAND											$2,690,700	2,690,700
BUILDINGS											1,308,400	1,308,400
TOTAL ASSETS	$[12,800]	$546,600	$148,500	$8,500	$25,600	$13,200	$2,800	$35,800	$42,400	$[377,500]	$3,999,100	4,432,200
LIABILITIES												
NOTES PAYABLE										$21,300		$21.300
ACCOUNTS PAYABLE		$43,700	$5,600		$3,800	$15,200						68,300
ACCRUED EMPLOYEE COMP.	$4,900	24,100	1,900	$10,600		7,500		$35,400				84,400
WITHHOLDING TAXES										1,900		1,900
ACCRUED F.I.C.A.										2,800		2,800
ACCRUED UNEMPLOYMENT										29,800		29,800
ACCRUED WORKERS COMP.										3,100		3,100
OTHER DEDUCTIONS												
PAYABLE TO OTHER FUNDS	8,700			82,200	'2,300	23,600	$1,600.			241,200		359,600
TOTAL CURRENT	$13,600	$67,800	$7,500	$92,800	$6,100	$46,300	$1,600	$35,400	-0-	$300,100		$571,200
INDIRECT OVER-RECOVERY												
LONG TERM NOTES PAYABLE										$20,200		$20,200
TOTAL LIABILITIES	$13,600	$67,800	$7,500	$92,800	$6,100	$46,300	$1,600	$35,400	-0-	$320,300		$591,400
FUND BALANCE	[26,400]	478,800	141,000	[84,300]	19,500	[33,100]	1,200	400	42,400	[697,800]	3,999,100	3,840,800
TOTAL LIABILITIES & FUND BAL.	$[12,800]	$546,600	$148,500	$8,500	25,600	$13,200	$2,800	$35,800	$42,400	$[377,500]	$3,999,100	4,432,200

BEST COPY AVAILABLE

Exhibit VII

LAC COURTE OREILLES TRIBAL GOVERNMENT
SUMMARY OF FISCAL 81-82 GRANT ACTIVITY (ACTIVE CONTRACTS)

Division Title	Award Amount	Cash Received	Less Indirect	Cash Available To Programs	Total Expense	Excess of cash Received over Paid out	Contract Award Over (Under) Expenditures
Health Division	$ 666,651	538,070	32,887	505,18	526,609	(21,426)	107,155
Education Division	4,977,449	3,081,805	241,506	2,840,299	2,389,766	450,533	2,346,177
Bureau of Indian Affairs	414,876	384,694	28,029	356,665	316,149	40,516	70,608
Department of Labor	415 467	343.530	3,565	339,965	387,433	(47,468)	24,469
Social Service Division	432,404	341,152	11,358	329,794	346,169	(16,375)	74,877
Tribal Misc. Programs	5,734	534	-	534	1,256	(722)	4,478
Administrative Support Division	139,779	126,857	-	126,857	103,542	23,315	36,237
Sub-Total	$ 7,052,270	4,816,642	317,345	4,499,297	4,070,924	428,373	2,664,001
Construction Projects	830,000	719,666	-	719,666	714,087	5,579	115,913
Total	$ 7,882,270	5,536,308	317,345	5,218,963	4,785,011	433,952	2,779,914

Exhibit VIII.1

LAC COURTE OREILLES

TRIBAL GOVERNMENT

Examples of indirect cost as applied to tribes

THEORETICAL OVER-RECOVERY: EXAMPLE #1

DEFINITION: Theoretical over-recovery occurs when the actual expense of the I/C pool is less than the amount justifying the approved rate as determined by the subsequent OIG. audit.

AUDIT:

FY	Approved Rate	Approved Budget	Actual Expense	Negative Difference
81	28.2%	$950,000	$600,000	$350,000

ACTION: Rate for fiscal year 1983 is negatively adjusted by 350,000, thus:

FY	Proposed Rate	Approved Budget	Adjusted Rate	Adjusted I/C Pool Income	Actual Expenses	Additional Tribal Debt
83	20%	$700,000	[10%]	$350,000	$700,000	[$350,000]

AFFECT: The Tribe would be expected to spend in Fiscal Year "82 $700,000 while only being allowed to recover $350,000 due to the adjust for the $350,000 not spent in the prior fiscal year. This creates a situation where the Tribe must find an independent source of revenue or go in debt if it has no other sources of revenue.

This case assumed that the budget was fully funded (950,000) even if in fact it was not and is required if the Tribe wants to avoid actual over-recovery on grants which they drew indirect cost at 28.2% (Fy "81) rate.

Exhibit VIII.2

THEORETICAL UNDER-RECOVERY: EXAMPLE #2

DEFINITION: Theoretical under-recovery occurs when the actual expense of the indirect cost pool exceeds the amount justifying the appoved rate as determined by the subsequent OIG audit.

AUDIT:

FY	Approved Rate	Approved Budget	Actual Expense	Positive Difference
82	20%	$600,000	$800,000	$200,000

ACTION: Rate for Fiscal Year "84 is positively adjusted by $200,000.

FY	Proposed Rate	Approved Budget	Adjusted Rate	Adjusted I/C Pool Income	Actual Expenses	Cash Credit
84	20%	$800,000	25%	$1,000,000	$800,000	$200,000

AFFECT: The Tribe would be expected to spend $800,000 while recovering $1,000,000. This would have the tendency to inflate the expenses such that an ever increasing rate would occur. However, as the rate increases the difficulty of full recovery at that rate becomes increasingly difficult and thus a moot issue.

EXHIBIT VIII.3

ACTUAL OVER RECOVERY: EXAMPLE #3

DEFINITION: Actual over recovery occurs when a individual contract pays more than what the approved Indirect Cost rate allows.

CONTRACT:	NAME	DEPARTMENT	FY	APPROVED RATE	APPROVED RECOVERY	ACTUAL RECOVERY	ACTUAL OVER-RECOVERY
	Johnson O'Malley	B.I.A.	'80	20.9%	$14,324	$25,593	$11,269

AFFECT: The Tribe in this case received $11,269.00 more than they should have creating payback liability which must surface during the closeout process. It would be left up to the funding agency to initiate the mechanism for payback as the liability has no relationship to the carry-forward adjustment on any future indirect cost rate.

This happens when the actual recovery rate ($) was at an indirect cost rate (%) higher than the finally approved rate. The two rates are an outcome of under funding the original Indirect Cost budget.

EXHIBIT VIII.4

ACTUAL SHORT-FALL (UNDER-RECOVERY): EXAMPLE #4

DEFINITION: Actual under-recovery or shortfall occurs when an individual contract pays less than what the approved Indirect Cost rate allows.

CONTRACT:

NAME	DEPARTMENT	FY	APPROVED RATE	APPROVED RECOVERY	ACTUAL RECOVERY	ACTUAL UNDER - RECOVERY
Title I	B.I.A.	'80	20.9%	$13,759	-0-	$13,579
Voc. Ed.	Ed.	'80	20.9%	$38,007	$23,305	$14,702

AFFECT: These two examples show no recovery at all and partial recovery. The difference between the approved recovery and the actual recovery is approximately $28,500 where the Tribe must provide the cash either through independent revenues or go into debt. If the Tribe does neither, then the difference reduces the cash available for the indirect cost pool which would create a negative carry-forward adjustment in the future indirect cost rate.

In this particular case, the Tribe went in debt at our local bank through the umbrella arrangement for offsetting deficit accounts because we needed this level of administrative support to effectively administrate federal grants and contracts.

Exhibit IX

SUMMARY

THREE YEAR HISTORY OF SHORTFALLS IN INDIRECT COST

History of the last three years of Indirect Cost activity shows the following:

- Actual spending equal to the approved budget plus, in 1979 and 1980, an over-recovery of Indirect Cost from some programs.
- Actual funding of the Indirect Cost Pool to be much smaller than the approved budget plus over-recovery, leading to large deficits in all years. These deficits are cumulative.

FISCAL YEAR	APPROVED RATE	APPROVED BUDGET	OVER RECOVERY	TOTAL SPENDING	ACTUAL FUNDING	SHORT FALL
1979	7.6%	$267,691	$88,636	$356,327	$150,464	($205,863)
1980	20.9%	565,322	71,454	636,776	303,660	($333,116)
1981	17.7%	599,146	0	599,146	380,668	($218,478)
TOTAL		$1,432,159	$160,090	$1,592,249	$834,792	($757,457)
Budget compared to actual funding		$1,432,159			($834,792) =	$597,367 160,090 $757,457

The Tribe has made significant cuts in its administrative budget for FY 1981 in order to reduce the Indirect Cost rate to 17.7% from 28.2%. For the most part, salaries have been frozen at FY 1980 levels, and elimination of various positions and cuts in most departments have been effected since February/March 1981.

Details of Indirect Cost funding by program appears on the following pages.

Exhibit X

LAC COURTE OREILLES

TRIBAL GOVERNMENT

Reduction in Indirect Cost Expenditures

Line Item	Original Approved FY "81 Indirect Cost Budget	Actual First Quarter Expenses October 1 - Dec. 31 1980	Revised FY '81 Indirect Cost Budget	Actual Last Quarter Expenses July 1 - Sept. 30 1981	Total Annual Expenditures
Salaries & Wages	153,632	$127,747.07	101,270	$72,333.60	96,773
Fringe Benefits	23,752	12,490.08	16,750	7,481.11	12,788
Travel	17,362	15,349.13	7,970	4,190.24	10,029
Supplies	13,410	8,736.48	6,055	24,151.01	10,827
Utilities, Maintenance, Other	28,898	15,509.86	17,297	13,062.96	18,018
	$237,054	$179,832.62	$149,342	$121,218.92	$148.435
Monthy Basis	$79,018	$59,944	$49,781	$40,406	$49,475
Annual Basis	$948,217	$719,330	$597,368	$484,875	$593,721

TOTAL ANNUAL BUDGET (EXPENSES)	$597,368		593,721
ACTUAL AGENCY FUNDING	380.668		380,668
SHORTFALL	$216,700		$213,053

EXHIBIT XI. 1

State Bank of Drummond
P.O. Box 69 Drummond, Wisconsin 54832 Phone: 715-739-6222

July 14, 1981

Mr. Gordon Thayer
Chairman
LCO Tribal Governing Board
Route 2
Hayward, WI 54843

Dear Gordon:

With some dismay I must report to you that beginning January 1, 1982 we will no longer be able to merge the various accounts of the Tribe into one balance. As you know, during the past 18 months this program has enabled the Tribe to utilize all funds on deposit with the Bank without having to make transfers to cover overdrafts in the general fund. This has been a cost savings procedure both for the State Bank of Drummond and for the accounting department at LCO. However, as the enclosed notice from the Federal Deposit Insurance Corporation indicates we will no longer be able to offset over drafts against accounts that have funds, even though they are held in the same right and capacity.

I would appreciate if you would make provisions to handle this practice as soon as practical within your accounting department as I believe it should be instituted prior to January 1, 1982 to insure it is working smoothly.

If you have any questions or if I can be of any assistance, please feel free to contact me.

Sincerely,

Raymond J. Rudnicki
President

RJR/vv
CC: Darrell Coons
Duane Slayton
enc.

Branch Offices: Barnes, Wisconsin 715-795-2304
Cable, Wisconsin 715-798-3646

EXHIBIT XI. 2

FDIC
FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C. 20429
OFFICE OF THE CONTROLLER

REPORT OF CONDITION

BL-43-81
July 8, 1981

TO: CHIEF EXECUTIVE OFFICERS OF INSURED BANKS

SUBJECT: Offsetting of Overdrafts in Accounts Held in the Same Right and Capacity

A review of reporting procedures and requirements under the Federal Deposit Insurance Act has revealed that a practice that has been allowed for a number of years violates the statute. This practice is the offsetting in Reports of Condition of overdrafts in one account against funds in another account if the accounts are held in the same right and capacity. Section 7(a)(4) of the Act states in part:

> "....each insured bank shall report the total amount of the liability of the bank for deposits in the main office and in any branch....without any deduction for indebtedness of depositors or creditors (emphasis added)...."

All overdrafts must be reported in future Reports of Condition on a gross basis with no offsets between accounts even if they are held in the same right and capacity. This will be the case for both commercial and trust accounts.

This revised reporting procedure will become effective on January 1, 1982, and will apply beginning with the March 31, 1982, Report of Condition. If you have any questions on this matter, please call the undersigned toll-free on 800-424-4334, extension 735.

J David Shaffer

J. David Shaffer
Fiscal Agent

Distribution: Insured Commercial and Mutual Savings Banks

EXHIBIT XI.3

LAC COURTE OREILLES
TRIBAL GOVERNING BOARD
Pride Of the Ojibwa
Route 2 • Hayward, Wisconsin 54843
(715)634-8934

March 14, 1980

State Bank of Drummond
Drummond, Wisconsin

RE: Tribal Bank Account(s)

Attention: Raymond Rudnicki, President

As your largest customer, we have an urgent requirement to ask of your bank:

> Except for our Housing Authority and Tribal Enterprises, the sum total of all our accounts with you must daily be considered as arithmetically consolidated.

An over-draft, for example, would only come to the fore when the sum total of all checks presented exceed deposits. This allows us to properly deposit to the requisite accounts and yet know that an underdraft in one account permits an over-draft in another. Upon a consolidated over-draft position, notes or other line-of-credit short-term arrangements can be made to cover that interim shortage. Likewise this would lessen the probabilities of transfers and similar adjustments.

Not just thousands but millions flow through your bank as generated by us. We feel this request is consistent with banking principles and guidelines. If you see some legal difficulty with providing us with this courtesy, please advise immediately.

Sincerely,

R. Duane Slayton
Acting Executive Director

Exhibit XI,4

RESOLUTION NO. 80-68

Passed July 8, 1980

RESOLUTION AUTHORIZING DEPOSITORY BANK TO TRANSFER FUNDS AMONG CHECKING ACCOUNTS.

By the lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, a Federally recognized Indian tribe, here and after referred to as Tribe.

WHEREAS the undersigned has designated the State Bank of Drummond, Drummond Wisconsin, hereinafter referred to as "Bank" as the depository bank for the funds of the Tribe, and,

WHEREAS the Tribe presently maintains numerous accounts including checking accounts at said Bank and may, as needed, establish additional accounts at said Bank, and,

WHEREAS it is in the best interest of the Tribe that said Bank be authorized and empowered to transfer funds from Tribe accounts, including checking accounts presently maintained, or to be established into other accounts including checking accounts presently maintained or which are established in the future,

IT IS HEREBY RESOLVED that said Bank is authorized, and empowered to transfer funds from any Tribe account or checking accounts into any other account or checking account of the Tribe, presently maintained or which are established in the future, when in the sole discretion of the Bank it is deemed desirable for banking purposes, provided that the Tribe shall be given notice of any transfers and deposits within a reasonable time after any transfer is made. For purposes of this resolution only, notification in the monthly checking account statement shall be notice within a reasonable time.

IT IS FURTHER RESOLVED that the Tribe assumes full responsibility and holds harmless the Bank for any and all transfers made pursuant to this resolution.

Exhibit XI, 5

IT IS FURTHER RESOLVED that this resolution supplements and does not replace or repeal any previous resolutions of the Tribe relating to deposits with the Bank.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, a Federally recognized Indian Tribe.

BY:
Lac Courte Tribal Governing Board

Chairman

Vice Chairman

Secretary Treasurer

Counsel Member

Counsel Member

Exhibit XII.1

LAC COURTE OREILLES
TRIBAL GOVERNMENT

Tribal Asset Usage

Tribal Timber Example*

Annual Allowable Cut of Timber on Sustained - Yield Basis		Accumulated Allowable Cut as of 1/1/79 of All Timber Types****	Approximate Current Fair Market Value of Accumulated Allowable Cut
Pulp/firewood:	10,362 cords**	80,238 cords	$2,785,940
Sawlogs :	475 MBF***	3,349 MBF	414,262
			$3,198,202*****

- * Includes Timber on all 17,000 acres, of which only 10,000 acres are suited to modern, forestry, sustained-yield practices
- ** A "cord" is a unit of measurement of logs piled 8' x 4' x 4'
- *** MBF stands for thousand board feet, a board foot being 12" x 12" x 1"
- **** But does not include hemlock and tamarack
- ***** Approximate "stumpage" value $386,435 (sale of standing timber)

Exhibit XII.2

LAC COURTE OREILLES
TRIBAL GOVERNMENT

Tribal endowments and Settlements

Lac Courte Oreilles Tribe participated in judgement claims awarded by the Court of Claims for damages to the tribe involving the sale of land under the 1837 and 1854 treaty. These claims are called: Docket 18-C STU. Lac Courte Oreilles share of the total award is approximately 3.3 million dollars. Many other Bands of Lake Superior Chippewas and Mississippi Chippewas participate in this award. In addition to these dockets there is Docket 18-S and 18-U which have not been appropriated.

Docket 18-C was appropriated in 1974 and Docket 18-T was appropriated on October 31, 1972. The principle amount for Docket 18-C and 18-D was $1,122,603.84. The total interest on these two (2) dockets as of August 31, 1981 was $944,416.93. Thus, the total of 18-C and 18-D principal plus interest as of August 31, 1981 equals $2,670,020.77.

By statute there is mandated that 20% of the judgement claims award must be directed toward Tribal Government. Prior to use of these judgement claims money, it is imperitive that the Tribe come up with a payment roll and a distribution plan voted upon by the members of the Tribe in a referendum called for that purpose.

OTHER LITEGATION

Lac Courte Oreilles Tribe is presently in settlement negotiations with Northern State Power Company and others regarding the Chippewa Flowage which is partially inundates the Lac Courte Oreilles Reservation. As a result of flooding for power purposes the Lac Courte Oreilles Tribe is damaged by that action which devastated a rice crop which has been stipulated to of been 25,000 pounds per year. The market rate for wild rice today varies between $5.00 and $8.00 per pound. Although it is too early to predict the outcome of this matter, it is clear that the Tribe has suffered damages for over 61 years for the loss of rice, which must be addressed. Also the Tribe continues to suffer the loss of rice every year that the power dam is operated for power purposes.

Finally, the Lac Courte Oreilles Tribe is also suing a vendor for a fraudulent sale of equipment to the Tribe. This complaint entails damages in the amount of approximately $370,000 dollars. Again it is too early to tell whether the Tribe's demands will be met.

EXHIBIT XIII

LAC COURTE OREILLES
TRIBAL GOVERNMENT

PROBABLE IMPACT OF NOT SOLVING THIS PROBLEM

The affect of not receiving Immediate Economic Relief is quite dramatic. We have cited below a number of events which could occur, for instance:

1. There would be a freeze on Federal Program Funds of approximately $500,000.00, which are now in other accounts in the State Bank of Drummond to off-set therein the General Fund Account now in deficit in that amount.

2. In order to continue operations for the next 6 to 9 months would require misuse of these Federal Program Funds. Approximately June of 1982, there would be a complete shut-down of all grant and contract activities as a result of the State Bank of Drummond freeze. As a result of being a defaulted contractor, we may not be eligible for subsequent program funding for FY 1982 - 83 and future years.

3. The Education Program, and the related school employees and children, would be shut-down as a result, about 300 students would be required to go into local school districts with corresponding increase costs to the school districts; federal funding would be required to give Indian Children a proper education. Buildings, which have presently been paid for would not be effectively used. In addition, about 100 employees and instructors would not be employed, of which, about 50 are non-Indian.

4. Unemployment compensation and other forms of financial aid would be required for approximately 2000 Tribal Members.

5. The Tribal Enterprises provide the ability for the Tribal Government to enjoy the economic multiplier effect. We believe the multiple affect is at least 2½ to 3 times the initial level of federal program funding. The annual Tribal budget is $7,500,000 to $8,000,000.00. On this basis the minimum economic effect is between 20,000,000 to $24,000,000 per year.

6. Discontinued Tribal Operations would be a waste of past expenditures for various buildings, goods and services and personnel. Major investments have been made in personnel training to administer an effective and efficient Tribal Government and the related Federal Programs. In addition, the cost of Tribal Operations would require a major rebuilding of the Tribal Governments goals and ojbectives without changing the overall costs to the Federal Government.

7. We anticipate the Bureau of Indian Affairs would be forced to administer various grants and programs such as the P.L. 638 activities.

EXHIBIT XIV

LAC COURTE OREILLES
TRIBAL GOVERNMENT
FY 1982 INDIRECT COST BUDGET

DEPARTMENT	DEPARTMENT BUDGET	PERCENT CHARGED TO INDIRECT	INDIRECT BUDGET
TRIBAL COUNCIL			
SALARIES	$148,700.00		
FRINGE BENEFITS	24,600.00		
OTHER	67,500.00		
SUBTOTAL TRIBAL COUNCIL	$240,800.00	50%	$120,400.00
ACCOUNTING			
SALARIES	175,285.00		
FRINGE BENEFITS	29,000.00		
OTHER	15,000.00		
SUBTOTAL ACCOUNTING	$219,285.00	100%	$219,285.00
DATA PROCESSING			
SALARIES	32,400.00		
FRINGE BENEFITS	5,400.00		
OTHER	21,500.00		
SUBTOTAL DATA PROCESSING	59,300.00	100%	$ 59,300.00
ADMINISTRATION			
SALARIES	108,235.00		
FRINGE BENEFITS	17,900.00		
OTHER	34,450.00		
SUBTOTAL ADMINISTRATION	160,585.00	100%	$160,585.00
SPACE COSTS			
SALARIES	48,205.00		
FRINGE BENEFITS	7,937.00		
OTHER	35,000.00		
SUBTOTAL SPACE COSTS	91,178.00	47.6%	$ 43,400.00
SWITCHBOARD			
SALARIES	9,460.00		
FRINGE BENEFITS	1,564.00		
OTHER	32,000.00		
SUBTOTAL SWITCHBOARD	43,024.00	30%	$ 12,900.00
TOTAL	$814,172.00		$615,870.00

EXHIBIT XV

LAC COURTE OREILLES
TRIBAL GOVERNMENT

ESTIMATED NET INCOMES OF TRIBAL ENTERPRISES

	FY 81	FY 82	FY 83
Commercial Center	$47,000	$162,500	$ 82,500
Cranberry Marsh	N/A *	135,000	30,000
Development Corporation	N/A **	250,000	150,000
Forest Products	(279)	50,000***	75,000***
Games	12,092	41,000	6,600
Graphic Arts	(2,970)	1,500	15,000
	$55,843	$640,000	$359,100
50%	27,921	320,000	179,550
30%	16,752	192,000	107,730

* Deferred to 1982

** Profits Carried Forward
to Finance New Projects

*** Including "Stumpage" monies
returned to Tribe

Exhibit XVI

LAC COURTE OREILLES
TRIBAL GOVERNMENT

Suggested revision to the Indirect Cost Reimbursement Funding Approach.

Recommendations for Discussion / Incl. Direct Cst, Fully funded /

1. For fiscal year "81, intervene to secure full funding for contract support at the rate negotiated and approved by the Office of Inspector General. Modifications to individual contract per each federal funding agency would be required.
2. Contract support funding in the form of "Cost Allocation Plans" are not being approved by OIG for medium to small Indian Tribes, although such plans maybe more workable by tribes such as ours.
3. The Cognizant Agency should also function as the lead funding agency by supporting the Tribe with its indirect cost budgeted funds and then seeking reimbursement from the other funding agencies.
4. Return to [illegible]

BEST COPY AVAILABLE

LAC COURTE OREILLES
TRIBAL GOVERNING BOARD
Pride Of the Ojibwa
Route 2 • Hayward, Wisconsin 54843
(715)634-8934

RESOLUTION NO.__________

WHEREAS, the Lac Courte Oreilles Tribe has experienced phenomonal growth in the past 10 years, increasing our population on the Reservation by 100% and going from a Tribal Budget of $1500 to now over $6,000,000 per year, and

WHEREAS, the Tribal governmental employment has gone in 10 years from no full-time employees to a seasonal high of over 300 people, and

WHEREAS, implementing and developing the concepts of sovereignty, self-determination and self-sufficiency takes an adequately funded, strong, well-organized Tribal Governing Board and central administrative staff, and

WHEREAS, the main means of funding central Tribal Government is through U.S. Government procedures under "Indirect Cost" program(s) which the Lac Courte Oreilles Tribe began to increasingly participate in over the past 4 years, and

WHEREAS, the annual budgetary needs of Lac Courte Oreilles central Tribal Government is $1,000,000, but even projected funding has fallen woefully short of that figure, and

WHEREAS, demands on central Tribal Government continue to increase as the population grows and more and better services are requested by Tribal members, and

WHEREAS, indirect cost funding consists of the application of a governmently authorized percentage of revenues attributable to various governmently supported programs which is presumably reflective of the common utilization of central administrative services by the various programs, and

WHEREAS, the Tribe during recent years has been assigned varying indirect cost rates, and

WHEREAS, despite the assignment of a particular indirect cost rate the various agencies of the Government which contract with the Tribe may or may not apply the established rate to program funding and upon their initial utilization of a particular rate may adjust the rates thereafter due to limitation of funds, and

WHEREAS, the Bureau of Indian Affairs has asserted an ability to pay only approximately one half of the Tribe's approved indirect cost rate in recent years, and

WHEREAS, any deficiency in contribution toward the central administrative expenses by any government agency means that the fund, if projected correctly, will be inadequate to meet the needs of the central administrative services of the Tribe, and

WHEREAS, the problem has been greatly compounded because those agencies which have allowed an adequate contribution toward central administrative government are authorized thereafter to seek a rebate if expenses utilized by central administrative government exceed the projected amount, and

WHEREAS, the above procedures are especially adverse to Indian Tribes because of the wide range of administrative detail and the many agency programs associated with a fully functioning Tribal Government, and

WHEREAS, the above procedures impair the proper functioning of tribal government and impair adequate projections and accountability in that (1) Indirect Cost funds cannot form an adequate basis of administrative services of an Indian Tribe unless all agencies with whom the Tribe deals honor the Indirect Cost rate established by the appropriate federal agency (2) some agencies because of their internal policies or because of their limitation of funds do not honor the rate but rather set a lesser rate thereby creating a deficit in monies necessary to run the established programs (3) upon the creation of a deficit those federal agencies that do contribute in accordance with the established rate or less than the established but more than the average contribution among the agencies, thereafter seek a rebate of funds or reduction during the following year's funding (4) the above creates a downward spiral that can be resolved only through reduction of program services, federal agencies honoring the original committment, or additional monies being brought in to fill the void, and

WHEREAS, the cash flow problems that Lac Courte Oreilles is currently suffering results from the transportation of inter-governmental accounting within a single agency under a standard rate to the application of governmental funds from many agencies, with many different standards and different policies, tribal affairs, and

WHEREAS, the monitary problems at Lac Courte Oreilles have been exasperated in the past three years due to accumulating under-recoveries each year, and

WHEREAS, the Bureau of Indian Affairs has recently based it's indirect cost rate attributable to Lac Courte Oreilles at a proportional share less than other tribes because of Lac Courte Oreilles' conservative estimates of it's forthcoming expenditures thus resulting in a proportionate disadvantage to Lac Courte Oreilles; while, however, at the same time the Bureau of Indian Affairs at its reduced rate paid a indirect cost rate to Lac Courte Oreilles in excess of other agencies, and

WHEREAS, the Bureau of Indian Affairs has specified that due to its paying a rate greater than other agencies, it is entitled to a rebate, and

WHEREAS, the problems inherent in the fallacious reasoning behind indirect cost accounting do not arise in any manner from the policies, practices or programs of the Tribe, and

WHEREAS, the Tribe's banking institution, State Bank of Drummond, has been in the practice of considering all the various accounts of the Tribe as one account for purposes of ascertaining a daily balance, and

WHEREAS, this procedure has been approved and permitted by the Wisconsin State Banking Commissioner, and

WHEREAS, all of the accounts of the Tribe are held by the Tribe in the same right and capacity, to wit, the authority of the Tribal Governing Board over the fiscal activities of the Lac Courte Oreilles Tribe, and

WHEREAS, the indirect cost cash shortfall as aforesaid has resulted in one Tribal bank account, the general fund account, to be operating in the red for a number of months, although offset by a positive balances in all other accounts as totalled, and

WHEREAS, as of January 1, 1982, the Federal Deposit Insurance Corporation is not permitting this practice of off-setting to continue, and

WHEREAS, there appears to be no way being legally exempt from this recent determination of FDIC, and

WHEREAS, this recent ruling will result in a chaotic and crippling situation come the first of the year in 1982, and

WHEREAS, since the current financial difficulties of the Tribe were created through application of governmental procedures, it is appropriate that the Tribe seek assitance from the federal government in addressing in a fiscally responsible manner the current deficit, particularly since the Tribe has no tax base upon which to draw, and

WHEREAS, the Lac Courte Oreilles Tribe has sought technical assistance from the Bureau of Indian Affairs in addressing inadequate contract support funding on numerous occasions in prior years, and

WHEREAS, the Bureau of Indian Affairs has failed to actively address Lac Courte Oreilles' request for technical assistance on the inadequacies of indirect cost funding, and

WHEREAS, the lack of technical assistance has compounded and contributed to the problem of understanding indirect cost funding by the Lac Courte Oreilles Tribe, and

WHEREAS, the working relationship between the Office of Inspector General and the Lac Courte Oreilles Tribe has deteriorated in prior years because of a lack of adequate understanding of indirect cost principles, and

WHEREAS, the Lac Courte Oreilles Tribe has now begun to comprehend the complexities and inadequacies of Indirect Cost funding and has implemented necessary corrective action i.e. reduction in tribal administrative staff, reduced administrative spending levels, reduced the FY 1982 Indirect Cost Rate, testified to the House Interior Appropriations Committee with detailed documentation on the harships caused by the inadequacies of Indirect Cost funding,

NOW THEREFORE BE IT RESOLVED, that the Bureau of Indian Affairs in conjunction with its trust responsibility to federally recognized tribes assist the Lac Courte Oreilles Tribe through this financial crisis created by the inadequacies of Indirect Cost funding, by considering the following proposals:

1. Provide long term (10 year) low interest loan to the Lac Courte Oreilles Tribe that would include the $650,000 deficit created by inadequate indirect cost funding and $150,000 necessary for operating capitol for FY 1982, and
2. Write off the actual over-recovery deficit of $160,000 created in FY 1979, 1980, and 1981.

RESOLUTION NO.________
Page - 5

3. Take appropriate action to prevent further financial shortfalls created by the inadequacies of the Indirect Cost funding formula

CERTIFICATION

I, the undersigned, as Secretary-Treasurer of the Lac Courte Oreilles Tribal Governing Board, hereby certify that the Governing Board is composed of____members of whom_____, being present, constituted a quorum at a meeting thereof duly called, convened, and held on this______day of _______________, 1981; that the foregoing resolution was duly adopted at said meeting by an affirmative vote of________members;______against, and that said resolution has not been rescinded or amended in any way.

James H. Schlender, Secretary-Treasurer
Lac Courte Oreilles Tribal Governing Board

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
MINNEAPOLIS AREA OFFICE
15 SOUTH FIFTH STREET
MINNEAPOLIS, MINNESOTA [illegible]

IN REPLY REFER TO:
Contracts-Admin

SEP 30 1981

Gordon C. Thayer, Chairman
Lac Courte Oreilles Tribal Governing Board
Route 2
Hayward, WI 54843

Dear Mr. Thayer:

This letter is in reply to several questions you asked in your letter of August 7, 1981.

Additional funding to the amount of $36,000.00 has been made available for continuation of your contract with Coopers and Lybrand. These funds have been obligated under Contract No. F50C14201915.

You express concern over which a bank could force your government into receivership which would come under the federal proceedings contained in the Revised Bankruptcy Act of 1978, P. L. 95-598, 11 U.S.C.§§ 101-1482.

It is our Solicitor's opinion that a tribal government may not be a debtor under Section 109 of the Federal Bankruptcy Act. That section provided that

> 'only a person that resided in the United States, or has a domicile, a place of business, or a municipality may be a debtor under this title.'

Person is defined as "individual, partnership and corporation, but does not include governmental unit." 11 U.S.C. § 101(30).

Municipality means "political subdivision or public agency or instrumentality of a state." 11 U.S.C. § 101(29).

They further state,..."It is clear, then, that a tribal government does not fall within the provisions of Section 101, and therefore, the Bankruptcy Act does not apply."

They also mention that as to a tribal corporation the conclusion is the same, but less direct. The Solicitor states corporations are "persons" who may be debtors under Section 109, but tribal businesses incorporated under tribal law have special characteristics - chiefly owing to the limitations on their susceptibility to suit - which effectively preclude application of the Bankruptcy Act. Tribal businesses chartered under a tribal constitution may have some assets specifically pledged to meet the debts of the corporation. Other property not specifically pleged or assigned is not generally available to satisfy debts, however.

The question as to whether the bank can collect monies from your other accounts to satisfy a delinquent account, however, would be applicable to state and federal banking statutes. Banks normally in the course of sound business practices require depositors with more than one account to sign statements allowing them to secure funds from another account to satisfy a deficit account.

We should point out that the Bureau of Indian Affairs has no requirement that you maintain separate bank accounts for each program and that the administrative funds be kept separate. A contractor has an obligation to spend the funds in a contract for the purposes of the contract, see 25 CFR # 271.74 (3). Our fiscal accountability requirement is that a contractor's accounting records meet acceptable accounting standards, see 25 CFR # 271.46. This is to provide an audit trail on all the line items in each contract. The only exception to the above is some education programs.

Contracts and grants under P. L. 93-638 are cost reimbursable and as such funds should be advanced only enough to cover immediate needs. Since you are under the letter of credit system to satisfy expenditures under your contracts the regulations of the U. S. Treasury apply. Chapter 2000 # 2025 of the U. S. Treasury Manual states "Advances - shall be limited to minimum amounts necessary for immediate disbursement and shall be timed to be in accord only with the actual immediate cash requirements - in carrying out the purpose of an approved program."

If a contractor has excessive amounts of cash on hand beyond their immediate needs, they would be in violation of the above regulations which could lead to a suspension of their letter of credit.

If a contractor had received advances of funds for a contract and lost control of these funds this would not excuse the contractor from performing the contract. Failure to perform would be a breach of contract, see # 271.75 of 25 CFR.

The dilemma in which you are now faced is caused, and it appears we are in agreement on this, that is has been brought about by an excessive indirect cost rate in prior years leading to large amounts of over recovery. A review of your accounts receivable from previous years to present shows that you are making good progress in extraditing yourself from the problem.

We would suggest that for Fiscal Year 1982 careful attention be given in budgeting administrative costs for each program. It would also appear that you are probably going to have to make a determination as to whether a reduction of administrative and program staff may not be necessary in order to further reduce your accounts payable. It seems fairly certain that there will be further program cuts this coming year and if it is desirable to maintain past service levels as much as possible, staff may have to be reduced.

The fact that other government agencies do not provide full indirect costs for their contracts is a problem with many tribal contractors. We are asking the Central Office to bring this to the attention of Congress with some possible solutions.

If we can be of further help in aiding you in this problem, please advise.

Sincerely,

Acting Area Director

LAC COURTE OREILLES
TRIBAL GOVERNING BOARD
Pride Of the Ojibwa
Route 2 • Hayward, Wisconsin 54843
(715)634-8934

[illegible] / #

INDIRECT COST REIMBURSEMENT
DETAIL

THREE YEAR HISTORY FISCAL YEAR 1979, FISCAL YEAR 1980, FISCAL YEAR 1981

SUMMARY

Reductions in FY '81 Indirect Cost Spending
October 1, 1980 - September 30, 1981

L.C.O. TRIBAL DEPT.	APPROVED BUDGET @ 28.2%	NET REDUCTION	RENEGOTIATED BUDGET @ 17.7%	ACTUAL EXPENSE thru 9/30/81	ACTUAL RE-DUCTION	COMMENTS
Tribal Council	$ 173,705	$ 59,010	$114,695	$189,884	($16,179)	
Accounting	207,720	7,207	200,513	159,844	$ 47,876	
Legal	68,330	55,457	12,873	12,440	55,890	
Data Processing	93,460	46,719	46,741	35,974	57,486	
Admin.	277,415	128,393	149,022	41,340	236,075	
Space Costs	127,587	53,749	73,838	154,239	($266,52)	
TOTAL	$ 948,217	$ 350,535	$597,682	$593,721	$354,496	

DETAIL BY TRIBAL DEPARTMENT
REDUCTIONS IN FY 81 INDIRECT COST SPENDING
October 1, 1980 - September 30, 1981

Line Item	Approved Budget @ 28.2%	Net Reduction	Renegotiated Budget @ 17.7%	Actual Exsp. thru 9/30/81	Actual Reduction	Comment
Tribal Council						
Salaries	109690	40190	69500	133166	(23476)	
Fringe	16959	5464	11495	18007	(1048)	
Other	47056	13356	33700	38711	8345	
Sub-Tot.	173705	59010	114695	189884	(16179)	
Acct.						
Salaries	160640	(260)	160900	127390	33250	
Fringe	24835	(1778)	26613	17370	7465	
Other	22245	9245	13000	15084	7161	
Sub-Tot.	207720	7207	200513	159844	47876	
Legal						
Salaries	41100	32067	9033	9033	32067	
Fringe	6355	4861	1494	1061	5294	
Other	20875	18529	2346	2346	18529	
Sub-Tot.	68330	55457	12813	12440	55890	
Data Proc.						
Salaries	43780	18603	25177	24604	19176	
Fringe	6768	2604	4164	2717	4051	
Other	42912	25512	17400	8653	34259	
Sub-Tot.	93460	46719	46741	35974	57486	
Admin.						
Salaries	207140	92140	115000	34475	172665	Excludes only
Fringe	32025	13003	19022	4054	27971	Grant Adm.
Other	38250	23250	15000	2811	35439	Personnel Mgr.
Sub-Tot.	277415	128393	149022	41340	236075	Executive Dir.
Space Costs						
Salaries	52179	20520	31659	58425	(6246)	Actual Includ
Fringe	8066	2829	5237	7943	123	Safety
Other	67342	30400	36942	87871	(20529)	Switchboard,
Sub-Tot.	127587	53749	73838	154239	(26642)	Other Categories
TOTAL	948217	350535	597682	593721	354496	

SUMMARY

THREE YEAR HISTORY OF SHORTFALLS IN INDIRECT COST

History of the last three years of Indirect Cost activity shows the following:

- Actual spending equal to the approved budget plus, in 1979 and 1980, an over-recovery of Indirect Cost from some programs.
- Actual funding of the Indirect Cost Pool to be much smaller than the approved budget plus over-recovery, leading to large deficits in all years. These deficits are cumulative.

FISCAL YEAR	APPROVED RATE	APPROVED BUDGET	OVER RECOVERY	TOTAL SPENDING	ACTUAL FUNDING	SHORT FALL
1979	7.6%	$267,691	$88,636	$356,327	$150,464	($205,863)
1980	20.9%	565,322	71,454	636,776	303,660	($333,116)
1981	17.7%	599,146	0	595,146	380,668	($218,478)
TOTAL		$1,432,159	$160,090	$1,592,249	$834,792	($757,457)
Budget compared to actual funding		$1,432,159			($834,792) =	$597,367 160,090 $757,457

The Tribe has made significant cuts in its administrative budget for FY 1981 in order to reduce the Indirect Cost rate to 17.7% from 28.2%. For the most part, salaries have been frozen at FY 1980 levels, and elimination of various positions and cuts in most departments have been effected since February/March 1981.

Details of Indirect Cost funding by program appears on the following pages.

THREE YEAR HISTORY OF INDIRECT COST FUNDING

DEPT OF INTERIOR B.I.A.	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
I.T.A.C.		13626	0	13626	0
I.T.A.C.-D.P.		15296	0	15296	0
I.T.A.C.-G.E.D.		4124	0	4124	0
Self Det.		3359	0	3359	0
J.O.M.		3972	10388	0	6416
Higher Ed.		6288	3997	2291	0
Adult Voc. Trng.		2988	3425	0	437
Direct Employment		978	749	229	0
H.I.P.		1976	2754	0	778
Road Maint.		1520	5400	0	3880
Title I		5723	0	5723	0
BIA- P.P.		29271	106149	0	76878
SUB TOTAL		89121	132862	44648	88389
FY"80"	20.9%				
Adult Voc. Ed.		2888	5074	0	2186
Direct Employment		429	340	89	0
Higher Ed.		1804	3344	0	1540
I.T.A.C.		25161	30717	0	5556
J.O.M.		14324	25593	0	11269
B.I.A. - P.P.		103356	146402	0	43046
Title I		13759	0	13759	0
H.I.P.		8213	8236	0	23
Conservation		579	0	579	[illegible]
Road Maint.		1220	5400	0	4180
Audit		3950	0	3950	0
Garden Project		209	0	209	0
Youth Consv. Corps.		742	0	742	0
Rights Protection		25	0	25	0
Self Determination		3498	0	3498	0
2415 Claims		6169	0	6169	0
Summer Screening		1873	0	1873	0
SUB TOTAL		188199	225106	30893	67800
FY "81"	17.7%				
Adult Voc. Ed.		4432	4432	0	0
Direct Employment		1108	1108	0	0
Higher Ed.		14691	14691	0	0
I.T.A.C.		22218	22218	0	0
J.O.M.		13895	13895	0	0
School Operations		110284	110284	0	0
Title I		17798	0	17798	0
H.I.P.		5398	5398	0	0
Road Maintenance		3717	3717	0	0
Forestry		4878	4878	0	0
Rights Protection		30621	30621	0	0
Indian Child Welfare		3932	0	3932	0
Self Determination		7912	0	7912	0
SUB TOTAL		240884	211242	29642	0
TOTAL		518204	569210	105183	156189

DETAIL BY FEDERAL DEPARTMENT

THREE YEAR HISTORY OF INDIRECT COST FUNDING

CORP FOR PUBLIC BOARDCASTING	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
None		0	0	0	0
FY "80"	20.9%				
Broadcasting		2076	0	2076	0
Broadcasting Corp.		1996	0	1996	0
TOTAL		4072	0	4072	0

DETAIL BY FEDERAL DEPARTMENT

THREE YEAR HISTORY OF INDIRECT COST FUNDING

DEPT OF COMMERCE	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
None		0	0	0	0
FY "80"	20.9%				
N.T.I.A.		1877	0	1877	0
E.D.A. Planning		376	0	376	0
A.N.A. Planning		574	0	574	0
SUB TOTAL		2827	0	2827	0
FY "81"	17.6%				
None		0	0	0	0
total		2827	0	2827	0

DETAIL BY FEDERAL DEPARTMENT

THREE YEAR HISTORY OF INDIRECT COST FUNDING

DEPT. OF EDUCATION	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
Headstart Oper.		4485	0	4485	0
Headstart H/C		1586	0	1586	0
Pre-School		6320	0	6320	0
Title IV		22115	0	22115	0
Teacher Training		4924	2488	2436	0
Voc. Ed.		11735	11982	0	247
SUB TOTAL		51165	14470	36942	247
FY "80"	20.9%				
ABE-GED		13651	0	13651	0
Headstart H/C		301	0	301	0
Headstart Oper.		15204	0	15204	0
Pre-School		24778	28184	0	3406
Headstart T/TA		961	0	961	0
Teacher Training		23285	0	23285	0
Title IV		70487	0	70487	0
Title IV Library		2328	0	2328	0
Voc. Ed.		38007	23305	14702	0
SUB TOTAL		189002	51489	140919	3406
FY "81"	17.7%				
M.I.R.E.		3135	3135	0	0
ABE-GED		16977	6738	10239	0
Headstart H/C		690	0	690	0
Headstart Oper.		20178	0	20178	0
Preschool		18050	6875	11175	0
Headstart T/TA		912	0	912	0
Treacher Training		21934	9418	12516	0
Title IV		30688	14260	16428	0
Voc. Ed.		29141	0	29141	0
Day Care		25442	10924	14518	0
C.A.I.		21323	4920	16403	0
Title IV-A		3888	0	3888	0
SUB TOTAL		192358	56270	136088	0
TOTAL		432525	122229	313949	3653

DETAIL BY FEDERAL DEPARTMENT

THREE YEAR HISTORY OF INDIRECT COST FUNDING

DEPT OF HEALTH & HUMAN SERVICES	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
Health Management		3535	3132	403	0
L.P.N.		1154	0	1154	0
SUB TOTAL		4689	3132	1557	0
FY "80"	20.9%				
Health Management		9342	9590	0	248
L.P.N.		5496	5496	0	0
Water & Sewer		1819	0	1819	0
SUB TOTAL		16657	15086	1819	248
FY "81"	17.7%				
Health Management		14797	14797	0	
CHR/MCH		15726	15726	0	
Contract Health		17570	17570	0	
Social & Nutritional Serv.		7898	7898	0	
SUB TOTAL		55991	55991	0	
TOTAL		77337	74209	3376	248

DETAIL BY FEDERAL DEPARTMENT

THREE YEAR HISTORY OF INDIRECT COST FUNDING

DEPT OF H.U.D.	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
H.U.D. 701		912	0	912	0
H.U.D. 54-4		55189	0	55189	0
SUB TOTAL		56101	0	56101	0
FY "80"	20.9%				
Comp. Planning		6492	0	6492	0
H.U.D. 54-5		1806	0	1806	0
SUB TOTAL		8298	0	8298	0
FY "81"	17.7%				
None		0	0	0	0
TOTAL		64399	0	64399	0

DETAIL BY FEDERAL DEPARTMENT

THREE YEAR HISTORY OF INDIRECT COST FUNDING

DEPT OF JUSTICE	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
None		0	0	0	0
FY "80"	20.9%				
L.E.A.A.		1827	0	1827	0
FY "81"	17.7%				
Alternative Ed.		34063	34063	0	0
TOTAL		35890	34063	1827	0

DETAIL BY FEDERAL DEPARTMENT

THREE YEAR HISTORY OF INDIRECT COST FUNDING

DEPT OF LABOR	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
Title II		15946	0	15946	0
Title III		10286	0	10286	0
Title IV		22042	0	22042	0
S.Y.P.		2461	0	2461	0
Y.E.T.P.		3820	0	3820	0
Y.C.C.I.P.		636	0	636	0
Telecom.		9615	0	9615	0
Sub-Total		64806	0	64806	0
FY "80"	20.9%				
C.E.P. Admin.		120	0	120	0
C.E.T.A. Admin.		19479	0	19479	0
SUB TOTAL		19599	0	19599	0
FY "81"	17.7%				
C.E.T.A. Admin.		12380	12380	0	0
TOTAL		96785	12380	84405	0

DETAIL BY FEDERAL DEPARTMENT

THREE YEAR HISTORY OF INDIRECT COST FUNDING

DEPT OF TREASURY	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
Revenue Sharing		1809	0	1809	0
FY "80"	20.9%				
Revenue Sharing		4507	0	4507	0
FY "81"	17.7%				
Revenue Sharing		0	0	0	0
TOTAL		6316	0	6316	0

DETAIL BY OTHER DEPARTMENTS

THREE YEAR HISTORY OF INDIRECT COST FUNDING

STATE OF WISCONSIN	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
NONE		0	0	0	0
FY "80"	20.9%				
H.I.R.E.		3688	0	3688	0
Day Care		14205	0	14205	0
Alcohol & Drug Abuse		6564	2679	3885	0
Agency on Aging		3764	0	3764	0
Youth Center		894	0	894	0
Summer Feeding		4414	0	4414	0
R.N.I.P.		15761	9300	6461	0
O.M.A.W.		4845	0	4845	0
Weatherization		90	0	90	0
Upward Bound		149	0	149	0
I.P.A.		1793	0	1793	0
SUB TOTAL		56167	11979	44188	0
FY "81"	17.7%				
W.E.C.C.		22710	0	22710	0
H.I.R.E.		4422	2350	2072	0
Alcohol & Drug Abuse		5011	2757	2254	0
Agency on Aging		5760	0	5760	0
Energy		4083	0	4083	0
R.N.I.P.		12143	5615	6528	0
SUB TOTAL		54129	10722	43407	0
TOTAL		110296	22701	87595	0

DETAIL BY OTHER DEPARTMENTS

THREE YEAR HISTORY OF INDIRECT COST FUNDING

STATE OF WISCONSIN	APPROVED INDIRECT COST RATE	APPROVED INDIRECT COST BUDGET	ACTUAL FUNDING	SHORT FALL	OVER RECOVERY
FY "79"	7.6%				
NONE		0	0	0	0
FY "80"	20.9%				
H.I.R.E.		3688	0	3688	0
Day Care		14205	0	14205	0
Alcohol & Drug Abuse		6564	2679	3885	0
Agency on Aging		3764	0	3764	0
Youth Center		894	0	894	0
Summer Feeding		4414	0	4414	0
R.N.I.P.		• 15761	9300	6461	0
O.M.A.W.		4845	0	4845	0
Weatherization		90	0	90	0
Upward Bound		149	0	149	0
I.P.A.		1793	0	1793	0
SUB TOTAL		56167	11979	44188	0
FY "81"	17.7%				
W.E.C.C.		22710	0	22710	0
H.I.R.E.		4422	2350	2072	0
Alcohol & Drug Abuse		5011	2757	2254	0
Agency on Aging		5760	0	5760	0
Energy		4083	0	4083	0
R.N.I.P.		12143	5615	6528	0
SUB TOTAL		54129	10722	43407	0
TOTAL		110296	22701	87595	0

Senator COHEN. Ms. Edmo?

STATEMENT OF MAXINE EDMO, MEMBER, EDUCATION COMMITTEE, FORT HALL BUSINESS COUNCIL, FORT HALL, IDAHO, ACCOMPANIED BY HOWARD FUNKE, ATTORNEY

Ms. EDMO. Good morning. I am Maxine Edmo, from the Shoshone-Bannock Tribes in Fort Hall, Idaho. I am accompanied by Howard Funke, our tribal attorney, to my left.

The testimony which I will give is in opposition to the implementation of the grant process in the manner in which the Federal Government carries out its historical and special legal relationship with, and resulting responsibilities to, American Indian people.

I think our resolutions state our points best so I have written testimony here for those of you on the panel.

Senator COHEN. Your written testimony will be made a part of the record of this hearing.

Ms. EDMO. The Indian Self-Determination and Educational Assistance Act of 1975 is a complete Indian bill and I believe that tribal governments prefer this act. I quote from our resolutions:

> The U.S. Department of Interior has prepared draft revisions to the regulations implementing Public Law 93-638, the Indian Self-Determination and Educational Assistance Act of 1975; and
>
> Whereas such draft revisions would eliminate the existing contracting authority under 93-638 and replace same with grants and cooperative agreements; and
>
> Whereas such draft revisions are based upon a legal opinion by the Deputy Solicitor of the Interior Department, dated April 28, 1981, which concludes that elimination of existing contracting procedures under Public Law 93-638 is mandated by the Federal Grant and Cooperative Agreement Act of 1977, Public Law 95-224; and
>
> Whereas the foregoing Deputy Solicitor's opinion is legally unsound and unwise as a matter of policy; and
>
> Whereas any unilateral elimination of the contracting program without the consent of the Shoshone-Bannock tribes and other affected federally recognized Indian tribes is violative of the letter and spirit of 93-638; and
>
> Whereas the Shoshone-Bannock tribes strongly desire to retain the option of contracting under Public Law 93-638 as the most effective approach for achieving the political, cultural, and economic self-determination guaranteed to the tribes under the 1868 Fort Bridger Treaty; Therefore, be it
>
> *Resolved by the Business Council of the Shoshone-Bannock Tribes*, That:
>
> One, the Council strongly opposes any change in existing Public Law 93-638 regulations whereby the contracting option would be eliminated without the consent of affected tribes;
>
> Two, the Council would strongly support revisions in existing Public Law 93-638 regulations which retain the contracting option and which streamline current contracting procedures in order to maximize tribal self-government as envisioned by Public Law 93-638.

This is our resolution in regard to the block grants, the consolidated tribal grant program:

> Whereas, in accord with the administration policy and budget initiative, the Bureau of Indian Affairs last year had proposed a consolidation of 10 programs under one block grant called the consolidated tribal grant program and that these programs would also undergo budget reductions and consolidation of funds; and
>
> Whereas, 9 of the 10 programs are on the band analysis or Indian priority system and Johnson-O'Malley is distributed by a formula required by law; and
>
> Whereas, the CTGP provided for no consultation with tribes. Some education programs were included in the CTGP without consultation to determine if tribes wanted education programs included in the consolidated grant. In the case of

Johnson-O'Malley, the inclusion of JOM moneys in CTGP directly violated existing JOM regulations, as detailed in title XI, Public Law 95–561 and elsewhere; and

Whereas, the BIA, in its attempt to carry out a proposed CTGP, has apparently drawn its authority from Public Law 95–224, appears to be contrary to the language contained and set forth in Public Law 93–638 and Public Law 95–561; and

Whereas, the BIA maintains that this consolidation would be more effective and in no way disrupt the Tribal-Bureau relationship nor will it deviate from Public Law 93–638 and self-determination; and

Whereas, for fiscal year 1983 the BIA plans to expand the consolidated block grants programs to include three blocks of consolidation.

The first consolidation is education, the second even goes into trust areas, which we are really concerned about, and the third will be community and social services.

> Whereas unanswered by BIA are questions about the level of funding, reduction in force, method of administering, availability of administrative or contract support funds for tribes, legal mechanisms for contracting or granting funds to tribes.

And then our tribe went in opposition and sent in our resolution in opposition to what they are doing. We feel this is merely a vehicle for cutting services, staff, funds, at the reservation level. I further quote:

> Whereas the tribe should continue its efforts to oppose the attempts by the BIA to amend regulations regarding, and implementation and administration requirements of Public Law 93–638 by substituting and provision of grants-in-aid for the contractual provisions required pursuant to this act, recognizing the alleged illegality and the potential harm to Indian tribes, Indian school boards, and other Indian entities, if these regulations were to be so-amended.

In our resolution we stated that:

> Be it further
> *Resolved*, That the BIA should be mandated by Congress to restore funding to the 10 programs to the line items where originally funded and to continue funding programs through the existing line items for programs in fiscal year 1983 with no reduction in service, staff, and funds.

One of the reasons for the concern that we have is that we see the current revision of "638" regulations to conform to the requirements of 95–224 and establish a system of assistance grants in place of Indian self-determination contracts. It provides BIA with a paperwork vehicle compared to that of the U.S. Department of Education for rendering Federal aid to education.

Its initial stated purpose is Indian self-determination grants, but only a few changes would have to be made to convert it to Indian education grants to State school systems, and this is one of the concerns that we have also.

In the reorganization attempts also, the BIA is becoming increasingly limited in its scope and ability to provide services to Indian people.

We feel that the logic behind the reduction of personnel ceilings in the BIA is pressure being placed upon tribes to contract under 93–638, and if you contract, you really have no need for the positions. And in our reorganization statement that was submitted in writing to this committee, we stated also that we prefer that the BIA continue to administer these programs because in these times, with limited administrative funds to tribes, we see no need in contracting by our tribe.

We will submit further testimony in writing at a later date and I would like to turn the time over to our attorney unless there are questions by the committee.

Senator COHEN. Thank you very much. Would you state your name again?

Mr. FUNKE. My name is Howard Funke. I am a member of the Keweenaw Bay Band of Chippewa up in northern Michigan. I am tribal attorney for the Shoshone-Bannock Tribes.

I welcome the opportunity to comment on the proposed revisions to Public Law 93–638. We believe these revisions are unwarranted and unnecessary and illegal and a matter of poor policy. We urge that these regulations be withdrawn from consideration. To us it is another attempt by the administration to effect substantial changes in programs at tribal level without any input from the tribes, without any input from Congress, and the legal analysis that the Department of Interior uses to justify the revisions in these regulations is a familiar process. It is a classical case of the Department deciding where they want to go with a program and then going out and finding the legal criteria or the legal justification for it.

In this case it is based on some of the weakest legal analysis I have seen in a long time. It is unsupportable by any legal standard that I know of. It totally disregards established rules of Indian law, very similar to the decisions in *Oliphant* and the *Crow* case.

As to the practical effects of the provisions at tribal level, for the last 9 months we have experienced severe problems back on the reservation due to changes in major programs within the Bureau—the reductions in force, the phase-downs, the personnel restructuring—and we are also suffering from a substantial loss of tribal revenues due to the economic situation generally.

We cannot afford to have bureaucratic mess-ups. We are operating right now with all of our tribal funds being poured into tribal services and tribal government. We can not afford to take chances with new programs.

People back home are confused and they are nervous about what is going to happen. Morale is very low. Everybody back there is aware of the economic situation in this country and they are also aware of what the administration strategy is in cutting programs and cutting budgets.

The tribe is not opposed to fiscal accountability. We just want a chance to determine for ourselves what programs we will have and how we will administer those programs.

With all the cutting going on, the tribe is very leery of what the real motivation is behind all of these revisions. Last year, the Bureau proposed comprehensive development grant programs and these were not approved by Congress. Shortly after that, they came out with this. They unveiled this dubious legal theory, and they suddenly want to turn all the contracts over into a grant system. We believe that it is just a ploy to achieve reduction in funding and reduction in staffing under the guise of flexibility and local control and efficient administration.

Senator COHEN. You do not disagree with the desire to have more local control or flexibility. What you are saying is that it is really a guise to achieve budget reductions and calling it local control?

Mr. **Funke.** I do not think they are really being honest. I do not think they are giving us the straight dope. They talk about increased local control and increased flexibility, but I think reading between the lines—I do not think you have to read between the lines, the real goal is to reduce the amount of funding available to us at the tribal level.

Why else the big problem over determining exactly how indirect costs or support services are going to be handled? We do not know to this day exactly how that is going to be, how they are proposing to assist us in administering our programs.

The Bureau grant program presently has no system similar to the one under the grant program. There is no program support money. The budget and the Bureau request no money for any such assistance. This tells us that the operating subsidies will have to be taken from our service moneys. Due to the cuts that we have already experienced at the local level, and already reduced tribal revenues, we do not have the ability to absorb these costs.

Since the inception of 638, the rules and regulations promulgated by the Department have done nothing but set the tribes back, in my opinion, in their attempts to run the programs. Even under the contracting program, they insufficiently fund tribal programs as it is, and then ask us to be accountable and run effective programing without sufficient moneys.

Even if this operations cost problem is remedied, realistically I do not see how the Bureau can go through a major reorganization of basically its entire department, moving around all its personnel, restructuring all the responsibilities, moving offices, and all the attendant confusion that goes with that, and then embarking on a new economic development program. Then, at the same time, adjusting to all the funding cut-backs that they are experiencing and sometimes the total elimination of programs. And now they pick this time to change the major funding source that we use as a funnel for Federal dollars into the tribal systems.

They want to do this all by the beginning of the next fiscal year. I do not see how they can accomplish that, realistically.

We ask the question, with all this confusion in our key programs, how are we expected to move forward, and they keep asking us to do long-range planning. Those three or four major undertakings they are considering within the next 3 months is not long-range planning to me.

In addition to the dubious legal analysis that they have come up with, and the cost operations problem, and the logistic impossibility of all this change, I think the most important thing is, the Bureau and the administration have abandoned the purpose behind the Indian Self-Determination Act. That act was designed to turn over delivery of direct services by contracting those to the tribes as a means of reducing Federal responsibility and administrative costs, while allowing the tribes to determine their own destiny and being accountable to their own constituents. The act was intended to be a process and not a program. The Bureau has in reality turned that into a program. They have made it a program designed to be administered by them, thereby justifying their increased administrative costs and the growth of their function which is contrary to any intent of the act in the first place.

In point of fact, the Bureau's administrative costs have nearly doubled since 1975 when the act was put into effect. The whole purpose behind that act was to reduce costs, reduce administrative costs, and let the tribes have more responsibility and say in how they administer those programs.

Doubling of administrative costs is not evidence of fulfilling of the congressional-tribal intent. The BIA administration, under 638, is supposed to be reduced and not increased. Their actions have thwarted the intent of Congress and the intent of the tribes in passing 638.

Due to our powerlessness on the tribal level and congressional abdication of its responsibility to insure its laws are carried out in the manner intended, tribes are caught in a catch-22 situation where we must come back to this Congress and battle against the same entrenched power structure, over these very same issues, which should have been decided back in 1975. We are constantly evaluated and scrutinized on our ability and our effectiveness in implementing the intended goals and objectives of our contracts and our grants. We challenge this committee and Congress to insure that its agencies are subjected to the same scrutiny.

Congress can go on passing laws which Indian people adamantly support, but without critical and effective oversight by Congress of these laws, and their implementation, it is worse than passing no laws at all.

I believe we have a good law on the books in Public Law 93–638 already. The problem is the self-serving and paternal interests circumventing that law, which they are supposed to enforce. Thank you.

Senator COHEN. Thank you very much.

Ms. Edmo, your prepared testimony will be entered in the record at this point.

[The statement follows. Testimony resumes on p. 108.]

PREPARED TESTIMONY PRESENTED BY MAXINE EDMO, SHOSHONE-BANNOCK EDUCATION COMMITTEE, FORT HALL INDIAN RESERVATION

The testimony which I will give is in opposition to the implementation of the grant process in the manner in which the Federal Government carries out its historical and special legal relationship with, and resulting responsibilities to American Indian people. Several points need to be considered:

(1) The relationship between the United States Government and the various tribes of American Indians is a unique and special one that cannot be equated with the relationship of the Federal Government and the states that collectively make up the government of the United States of America. The relationship between the Tribes and the Federal Government is that of one sovereign to another. Since this is the case the application of P.L. 95-224 which applies to the relationship of the Federal Government to the states does not apply to its relationship to the Indian Tribes.

(2) Under P.L. 93-638, Indian Self-Determination and Education Assistance Act, the Congress of the United States acknowledges the special historical and legal relationship that exists between the American Indian people and the government of the United States and affirms its position to promote the maximum Indian participation in education and other Federal services to Indian communities. The implementation of the grant process will maximize the involvement of the Federal Government through the Bureau of Indian Affairs in the carrying out of the Federal responsibilities to the Indian people. (See Section 6, paragraph 2 of P.L. 95-224) These two ideas are in opposition to each other and cannot be reconciled. Since the impact of the earliest law (P.L. 93-638) must dicatate the policy of the Governement (Federal Government of the United States) and its relationship to the Tribes as representatives of the Indian people, the grant process cannot logically be implemented.

(3) By its very definition the word contract defines the relationship that exists between the Federal Government and the Indian Tribes.

A contract is "a binding agreement btween two or more persons or parties." An agreement is negotiated between the parties and as such reflects the desires and wishes of both parties involved. This is is essential to ensure the maximum involvement of the Indian people as stated in P.L. 93-638. A grant on the other hand, implies a gift or giving of something from one party to the other. One (the contract) is a bi-lateral agreement while the other (the grant) is unilateral in nature.

(4) The Congress of the United States Government has acknowldeged that there is a special relationship between the Indian People and the United States Government. It should be noted that this relationship was established by treaty. (1868 Fort Bridger Treaty in the case of the Shoshone Bannock Tribes) This relationship clearly established the political, economic, and cultural rights of self-determination for the Indian people. The maximum involvment assured by the contracting option is essential for the continued progress of the Indian people toward these goals.

(5) It should be carefully noted that the United States Government willingly accepted the special responsibility that exists toward the Indian people. There is no moral or legal way for it to escape this responsibility. The Indian people must be given more involvment, as promoted by the negotiations of contracts, not less as promoted by the grant process.

In light of these considerations, and as representative of the Shoshone-Bannock Tribes, I ask that the contracting option be retained as the one which will move the tribes toward the goal of self-determination. It is no more just for the government to impose requirements upon the Tribes unilaterally through the grant process, than it would be for the Tribes to arbitrarily impose requirements upon the Government of the United States. We must continue to negotiate in order to ensure fair and equitable treatment to all of the American Indian people. Attached is a copy of a tribal resolution expressing the official position of the Shoshone Bannock Tribes.

TRIBAL BLOCK GRANT FUNDING.

The proposed Consolidated Tribal Government Programs must be addressed. The C.T.G.P., proto-type for FY 1982 was conceived by the BIA without input or opportunity for comment before presentation to the Tribes. If contract schools are included in the proto-type operation the primary effect will be to deny individual contract schools direct access to the contracting agencies. Fiscal control, administrative over-head cost recoveries and possibly educational program control will be lost to the individual contract schools.

There are equally compelling reasons to retain the present contract relationship between the BIA and individual contract schools for the benefit of the Tribes. The government may not deny their responsibility to provide adequate educational opportunities to Indian children.

The BIA must continue its oversight and management responsibilities. The Block Grant to Tribal Governments will only create an additional and costly administrative level.

The BIA is proposing to expand the Block Grant concept in F.Y. 1983 to include three (3) sections of block grants. Our Tribe has passed a resolution which outlines our concerns regarding this latest attempt at eroding federal responsibilities to Indian people.

In conclusion, we must have the support of this committee and Congress, as we have in the past, in order to insure the realization of true Indian self-determination. Without adequate education you can never expect a population such as American Indians to truly be self-sufficient and responsible for its own direction. Our future and the eventual success of all your good work in the past rests now with your decision.

Again, let me say emphatically the contracting mode of operation is essential to the achievement of self-determination for American Indian people. Please do not allow the delay or erosion of progress that will occur if the grant procedure is implemented.

We will request that the record remain open for further testimpny from our Tribe. Thank you.

RESOLUTION

WHEREAS, In accord with Administration Policy and Budget initiative the Bureau of Indian Affairs last year had proposed a consolidation of ten programs under one block grant called the Consolidated Tribal Grant Program amd that these programs included would also under go budget reductions and consolidation of funds; and

WHEREAS, nine of the ten programs are on the band analysis or Indian priority system and Johnson O'Malley is distributed by a formula required by law; and

WHEREAS, the (CTGP) provided for no consultation with Tribes. Some education programs were included in the CTGP without consultation to determine if Tribes wanted education programs included in the Consolidated Grant. In the case of Johnson O'Malley, the inclusion of JOM monies in CTGP directly violated existing JOM regulations, as detailed in Title XI, P.L. 95-561 and elsewhere; and

WHEREAS, the BIA, in its attempt to carry out a proposed CTGP, has apparently drawn its authority from P.L. 95-224 appears to be contary to the language contained and set forth in P.L. 93-638 and P.L. 95-561; and

WHEREAS, the BIA maintains that this consolidation would be more effective and in no way disrupt the Tribal/Bureau relationship nor will it deviate from P.L. 93-638 and self Determination; and

WHEREAS, for fiscal year 1983 the BIA plans to expand the consolidated block grants programs to include three blocks of consolidation; and

WHEREAS, the first proposed block is "education" and includes higher education scholarships, adult education. Johnson O'Malley funds and tribal controlled Community College funds under P.L. 95-471; and

WHEREAS, the second consolidation will be designated "Community economic and Natural resource development", and BIA programs scheduled for inclusion will be Adult Vocational Training, direct employment, wild life program funds, real estate, ecomomic planning and development, aid to Tribal Governments and grants under Section 104 of the Indian Self-Determination and Education Assistance Act; and

WHEREAS, a third block will be "Community and Social Services", Law Enforcement, Housing, Social Services, Tribal Courts and fire protection are some of the program which will be slated for inclusion, but other services and funds would be added to this consolidation; and

Resolution EDUC-82-5854
Dated 17th, March, 1982
Page 2.

WHEREAS, unanswered by BIA are questions about the level of funding, reduction in force, method of administering, availability of administrative or contract support funds for tribes, legal mechanisms for contracting or granting funds to tribes; now

THEREFORE, BE IT RESOLVED BY THE BUSINESS COUNCIL OF THE SHOSHONE BANNOCK TRIBES, that we opposed any program Consolidation because of the following reasons:

> Little or no Tribal Consultation
> This is merely a vehicle for cutting services, staff and funds at the reservation level.
>
> The Consolidation violated the Consgressional intent of Title XI, P.L.95-561 and P.L. 93-638.
>
> This Consolidation is a flagrant violation of the trust responsibility.

BE IT FURTHER RESOLVED, that the BIA must comply with 25 CFR 31a4 (a) (1) (2), which requires that there be no new policy established nor any existing policy changed or modified without consultation with affected Tribes and Alaskan Natives entities and ensures that the Tribes and Alaskan Native entities guide policy formulation and funding priorities:

> (a) Tribes and Congress continue its efforts to oppose attempts by the BIA to amend regulations regarding and implementation and administratation requirements of P.L. 93-638 by substituting and provision of grants-in-aid for the contractual provisions required pursuant to that Act, recognizing the alleged illegality and the potential harm to Indian Tribes, Indian school boards, and other Indian entities, were these regulations to be so amended.

BE IT FURTHER RESOLVED, that the BIA should be mandated by Congress to restore funding the ten programs to the line items where originally funded and to continue funding programs through the existing line item for programs in F.Y. '83, with no reduction in service, staff and funds.

Authority for the foregoing resolution is found in the Indian Reorganization Act of June 18, 1934 (48 Stat., 984) as amended and under Article VI, Section 1 (a,r) of the Constitution and By Laws of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, Idaho.

Dated this 17th day of March, 1982.

EDUC-82-5854

Resolution EDUC-82-5854
Dated 17th, March, 1982
Page 3.

Kesley Edmo
Kesley Edmo, Chairman
Fort Hall Business Council

SEAL

CERTIFICATION

I HEREBY CERTIFY, that the foregoing resolution was passed while a quorum of the Business Council was present by a vote of 4 in favor, 2 absent, and 1 not voting on the date this bears.

Jenifer Christy
Jenifer Christy, Executive Secretary
Fort Hall Business Council

RESOLUTION

WHEREAS, the United States Department of the Interior has prepared draft revisions to the regulations implementing Public Law 93-638, the Indian Self-Determination and Educational Assistance Act of 1975; and

WHEREAS, such draft revisions would eliminate the existing contracting authority under Public Law 93-638 and replace same with grants and cooperative agreements; and

WHEREAS, such draft revisions are based upon a legal opinion by the Deputy Solicitor of the Interior Department, dated April 28, 1981, which concludes that elimination of existing contracting procedures under Public Law 93-638 is mandated by the Federal Grant and Cooperative Agreement Act of 1977, Public Law 95-224, approved February 3, 1978; and

WHEREAS, the foregoing Deputy Solicitor's opinion is legally unsound and unwise as a matter of policy; and

WHEREAS, any unilateral elimination of the contracting program without the consent of the Shoshone-Bannock Tribes and other affected Federally-recognized Indian tribes is violative of the letter and spirit of Public Law 93-638; and

WHEREAS, the Shoshone-Bannock Tribes strongly desire to retain the option of contracting under Public Law 93-638 as the most effective approach for achieving the political, cultural and ecnomic self-determination guaranteed to the Tribes under the 1868 Fort Bridger Treaty (15 Stat., 673); now

THEREFORE, BE IT RESOLVED BY THE BUSINESS COUNCIL OF THE SHOSHONE-BANNOCK TRIBES, that:

(1) the Council strongly opposes any change in existing Public Law 93-638 regulations whereby the contracting option would be eliminated without the consent of affected tribes;

(2) the Council would strongly support revisions in existing Public Law 93-638 regulations which retain the contracting option and which streamline current contracting procedures in order to maximize tribal self-government as envisioned by Public Law 93-638;

(3) the Chairman of the Council is authorized to sign the attached letter to Ken Smith, Assistant Secretary of Indian Affairs, which explains more fully the Tribes' opposition to the proposed revisions of existing Public Law 93-638 regulations and to the reasoning of the 1981 Deputy Solicitor's legal opinion; and

(4) the Chairman is authorized to contact other affected

The SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION
PHONE (208) 238-3700
(208) 785-2080

FORT HALL BUSINESS COUNCIL
P. O. BOX 306
FORT HALL, IDAHO 83203

November 23, 1981

Mr. Ken Smith, Assistant
Secretary of Indian Affairs
Office of the Secretary
United States Department
of the Interior
Washington, D. C. 20240

Re: Opposition to Revised Regulations
Implementing Public Law 93-638

Dear Mr. Smith:

In your letter of September 25, 1981 to Tribal leaders you requested comments regarding draft revisions to Department regulations implementing Public Law 93-638, the Indian Self-Determination and Education Assistance Act of 1975. The essence of these revisions is to abandon the existing Tribal-BIA contracting program under Public Law 93-638 and to substitute Federal assistance programs (grants and cooperative agreements) as the means for executing the Act.

As evidenced by the attached resolution of the Business Council authorizing this letter, the Shoshone-Bannock Tribes adamantly and totally oppose this unilateral attempt to eliminate the established contracting procedures under Public Law 93-638. For the reasons detailed below, we believe that the proposed revisions are both illegal and unwise as a matter of policy. Thus, we urge that such revisions be dropped immediately from consideration or, at a minimum, that all affected Federally-recognized Tribes be afforded a meaningful opportunity to express their views thereon.

The proposed revisions are the apparent result of a legal opinion issued by the Deputy Solicitor of the Interior Department on April 28, 1981. That opinion concludes that a shift from contracting to grants and cooperative agreements under Public Law 93-638 is mandated by the Federal Grant and Cooperative Agreement Act of 1977, Public Law 95-224, approved February 3, 1978. We find the legal rationale for that conclusion to be extremely suspect. Moreover, we are highly disturbed that the Bureau of

Indian Affairs initially sought and now supports this dubious legal position.

First, the Deputy Solicitor's opinion acknowledges that Public Law 95-224 does not refer expressly to Indian tribes. In addition, the opinion does not cite any legislative history showing that Congress intended by that statute to alter the contracting procedures authorized under Public Law 93-638. Nevertheless, the Deputy Solicitor adopts the sweeping position that Public Law 95-224 must be read to require replacement of existing contracts under Public Law 93-638 with grants and cooperative agreements.

This position ignores the unique legal status of Indian tribes as well as the special trust relationship owed to tribes by the Federal Government. Given these longstanding principles of Federal Indian law and the Congressional objective of furthering Indian self-determination via contracting under Public Law 93-638, it is unreasonable to assume that Congress silently intended in the 1977 Federal Grant and Cooperative Agreement Act to gut the contracting procedures it had expressly endorsed shortly prior thereto in the 1975 Self-Determination Act.

We suggest that Public Law 95-224 may be fairly interpreted to be in applicable to 638 contracting. Indian tribes are not "State and local governments" under Section 2(b) of the 1977 Act. To the contrary, they are soverign entities separate and distinct from the States and their subdivisions. Nor can tribes reasonably be equated, without explicit Congressional statement to this effect, with "other recipients" of Federal programs. In addition, the purposes of the 1977 Act --- to streamline Federal administrative procedures --- would hardly be served by eliminating established 638 contracting procedures in favor of a new grant mechanism.

Thus, we urge that you seek a re-evaluation of the Deputy Solicitor's opinion in light of the above considerations. That re-evaluation should properly include an assessment of the critical policy issues at stake as well as the legal principles ignored by the opinion. In view of the complexity of the matter, the major alterations proposed by the draft revisions, and the need for meaningful tribal input, all affected tribal governing bodies should be allowed ample time to voice their position on the policy issues.

We suggest, therefore, that each affected tribe be contacted as soon as possible so that all governing bodies may indicate their consent or opposition to the elimination of existing Public Law 93-638 contracting procedures. Since the correctness of the Deputy Solicitor's legal opinion is not fixed in concrete, all impacted tribes should be afforded this opportunity.

As expressed in the attached resolution, we firmly support a continuation of the contracting option under the 1975 Self-determination Act. We believe that option must be retained if the goals of the 1975 Act are to be realized. We perceive the proposed revisions as an avenue leading to more, not less, BIA involvement in tribal government and as a means of reducing necessary funding for operation of effective tribal programs. In brief, the abandonment of contracts will frustrate the self-determination goals underlying Public Law 93-638. In so doing, the Federal Government will further delay the achievement of meaningful political, economic and cultural self-determination guaranteed to the Shoshone-Bannock by the 1868 Fort Bridger Treaty.

As also evidenced in the attached resolution, the Shoshone-Bannock Tribes would favor revisions of existing regulations which are designed to streamline contracting procedures and thereby to enhance Tribal control of contracted programs and services. It is this type of positive change that the Interior Department should be addressing. In this respect, we view favorably those portions of the proposed revisions which focus accountability in implementing Public Law 93-638 programs at the Agency, rather than the Area Office level. This proposal should be coupled with a retention of the contracting mode of operation.

For the reasons set out herein, we ask that you suspend any further efforts to publish the proposal regulations pending receipt of views from all affected tribes.

Thank you for your prompt attention in this vital matter.

Sincerely,

Kesley Edmo, Sr., Chairman
Fort Hall Business Council

KE/cp
attachment
cc: U. S. Senate Appropriations Committee,
c/o Senator James McClure and Senator Mark Hatfield

U. S. House of Representatives Appropriations
Committee, c/o Representative Sidney Yates

U. S. Senate Select Committee on Indian Affairs
c/o Senator William Cohen and Peter Taylor, Chief Counsel

U. S. House of Representatives Interior Committee,
c/o Representatives Morris Udall

STATEMENT OF EDWARD LITTLE, EXECUTIVE ASSISTANT TO THE CHAIRMAN, ALL INDIAN PUEBLO COUNCIL, ALBUQUERQUE, N. MEX.

Mr. LITTLE. My name is Edward Little and I am with the All Indian Pueblo Council which represents the 19 pueblos of the State of New Mexico.

Mr. Chairman, today I come to make a statement on a problem that exists amongst most tribes and tribal organizations throughout Indian country.

The problem is inadequate funding to administer Federal programs. During the past decade, the Federal Government has encouraged, forced, and sometimes almost intimidated tribes and tribal organizations to strengthen their tribal governments to be more accountable programmatically and financially.

In response, tribes and tribal organizations like the All Indian Pueblo Council have gone through extensive reorganizations. The All Indian Pueblo Council, in 1975, consolidated and centralized its accounting systems, established central purchasing and personnel offices. An indirect cost rate was established. We realized a substantial savings by doing this.

These systems will work for us and reduce administrative cost overall. However, the same agencies that encouraged and forced these systems upon us are now making it fail through short-falls in contract support dollars, primarily in the 638 area.

Other agencies have failed to meet their obligations to provide us with the negotiated rates that we have negotiated with our cooperating agencies.

Mr. Chairman, as an example, All Indian Pueblo Council has maintained a negotiated indirect cost rate since 1975. Each year we have experienced an under-recovery due primarily to short-falls in the contract support area. For example, this past year alone, the BIA indicated to us at the start of the year that we would receive 100 percent contract support dollars. As late as December, they informed us that these funds would be reduced to 75 percent. In essence, for us that translates to about $200,000 in under-recovered dollars.

Yes, these things can be bumped, carried forward through various indirect cost rates. Earlier I was listening to some of the testimony and I would like to just briefly expound on that because I find many of these people very ill-informed and this I think goes down, clear down to the area offices. Most of our contracting officers do not understand the complexities or the mechanisms of indirect costing.

I noticed, as you asked some of the gentlemen from the Bureau what they understood about indirect costing, well, Mr. Smith alluded that the tribes were trying to get higher rates, and that is a fallacy. The larger the tribes, the more volume you have, the less your rate should be. The smaller the tribe, the less volume, the higher your rate is going to be.

Rates are based on different things. There is a fixed price cost carried forward rate. There is a provisional rate. There is a lump sum rate. Some can be based on total cost. Some can be based on total cost of personnel. Basically what the provisional rate does is, at the end of the year, you are allowed to adjust your rate. For example, if you have a rate of 10 percent of your total cost, and at the end of the year your actual rate is 11 percent, you are allowed to adjust that rate.

A fixed price carried forward rate is one whereby you are given a rate at the start of the year. You operate with that rate. For example, if it is 10 percent, at the end of that year, if you exceed that rate, you are allowed to—you end up with an under-recovery that you are allowed to carry forward for the next 2 years. In the ensuing year, your rate goes up to account for those under-recovered rates.

The lump sum rate is probably the one that we will probably be going to because it seems to protect us more than any other. It is one that allows us to have like an allocated figure when we submit our proposal, so we have one budget that we will operate throughout the year.

Some of the problems with this, and where our problem lies with the Bureau of Indian Affairs is, when we have a fixed price carried forward rate established, our administration through that year spends at 100 percent. We operate at 100 percent. If our programs do not spend at 100 percent, then we do not get the full 100-percent recovery that year.

And with the Bureau of Indian Affairs it is even worse because they are always coming up with shortfalls and most of the time it is too late to go into a program to recover any of thoses costs and make them up.

So in essence the Bureau of Indian Affairs, with the 638 contract support program, if it were a valid one—I understand they are always saying that they always project too much money. Well, they always end up with less money. I think one of the reasons is that the contract support dollars are used in other categories that are often hidden, and so consequently, most areas fall short. Primarily, I would imagine, they are used as discretionary funds for whatever purposes they might want.

So consequently, Mr. Chairman, most tribes are going bankrupt trying to operate Federal programs. Some of the other groups have suggested various things. One suggestion that we would have, would be that the Bureau of Indian Affairs also establish an administrative category to provide tribes with funds to defray any administrative costs. That would be one suggestion.

The other would be also for us to start a new slate for the Bureau of Indian Affairs to wipe-out or forgive all the under-recoveries that tribes are presently involved with now. If not, we are still faced with those costs. We still have high rates. And it creates a cash flow problem for most of us and I would venture to say that we will be retroceding the majority of our 638 contracts in another year or so if we do not get any relief.

The block grants also are going to create a further problem. Most block grants, if they go through the State mechanism, do not provide for any indirect costs or administrative overheads in most States. Most States, as they are set up for municipalities, and other governments have other sources of income, where tribes and tribal organizations have to rely on Federal dollars only.

The other issue is one of the changes in the regulations from grants to contracts. We have operated under the 638 mechanism since 1974. We have contracted a school, we have contracted other programs from the Bureau of Indian Affairs. One is always aware of the lack of funding to operate these programs.

We feel that it is just a mechanism whereby the onus would be placed on the tribes' organizations of accountability. Right now, through the contracting method, the Bureau of Indian Affairs has a certain amount of responsibility to its contractors, under the provisions of 638. With the grant process, the tribes and tribal organizations who go through the grant process will have most of the responsibility of accounting, accountability both programmatically and physically.

We submit that the present 638 regulations allow for a tribe to have the option to ask for a contract or a grant. We are the offerors. The Bureau of Indian Affairs is not the offereror. They are not offering to contract with us. We are offering to contract with them. And we feel that we should have the opportunity to exercise that.

Thank you.

Senator COHEN. Thank you very much. Your prepared statement will be included in the record at this point.

[The statement follows:]

PREPARED STATEMENT OF DELFIN J. LOVATO, CHAIRMAN, ALL INDIAN PUEBLO COUNCIL, SUBMITTED BY EDWARD LITTLE

Mr. Chairman and members of the Senate Select Committee on Indian Affairs, my name is Edward Little and I am making a statement for Mr. Delfin Lovato, chairman of the All Indian Pueblo Council, which is comprised of nineteen (19) New Mexico Pueblo tribes.

Mr. Chairman and members of the committee, I come before you today to present testimony on a problem that exists among most tribes and tribal organizations throughout Indian Country. The problem is one of inadequate funding to administer Federal programs. During the past decade the Federal Government has encouraged, and some times forced tribes to strengthen tribal governments to be more accountable programmatically and financially. In response, tribes and tribal organizations, like the All Indian Pueblo Council, have gone through extensive reorganization.

The All Indian Pueblo Council, in 1975, consolidated and centralized its accounting system, established central purchasing and establishing a personnel office. An indirect cost rate was established. We realized a substantial savings in overall administration. This system will work for us and reduce administrative costs both direct and indirect. However the same agencies that encourage and enforce these systems upon us are now making it fail, through short falls in contract support dollars for Public Law 93-638 contract and grant dollars; while other agencies refuse to provide or approve dollars to meet our negotiated indirect cost rates. Many of our Pueblo tribes are on the verge of bankruptcy.

The Indian Health Service on many of our 93-638 projects does not provide contract support funds at all. Consequently, we must take indirect dollars from program funds minimizing our program effort which does not coincide with the intent of Public Law 93-638; whereby we are supposedly funded at the same program level that IHS would have employed to administer the same program.

Mr. Chairman, as an example the All Indian Pueblo Council has maintained a negotiated indirect cost rate since 1975 and from 1978 to the present time we have experienced an under-recovery due primarily to short falls in contract support and lesser rates by individual agencies who basically did not honor our negotiated rate [a chart reflecting this under-recovery is attached].

This year alone in BIA and IHS 93-638 contracts we will under-recover approximately $200,000 due to a short fall in BIA and IHS contract support funding. In October of fiscal year 1982 when our programs started we were given 100 percent contract support dollars, only to have it reduced in late December to 75 percent and by then it was too late to adjust funding levels to make up the deficit. Which in our case, will result in an under-recovery of approximately $200,000. Due to the fact that inter-tribal organizations, like ours, are largely federally funded with virtually no other assets; we consequently start to experience cash flow problems when these short falls occur.

If these short falls in contract support funds continues, the All Indian Pueblo Council will be forced to retroceed its 93-638 contracts and close down its other operations and cease its advocacy for the 19 Pueblo tribes, and during these critical times this could prove disastrous for the Pueblo Nation.

In conclusion, we would like to offer two recommendations toward resolving these problems: (1) Th BIA provide supplementary funds to tribes and tribal organizations, eliminating all under-recoveries; and (2) provide administrative grants to tribes for the high cost of administering Federal programs and allow maximum use of program dollars.

Thank you for this opportunity and we respectfully request that if there is any further information needed that you please contact the All Indian Pueblo Council.

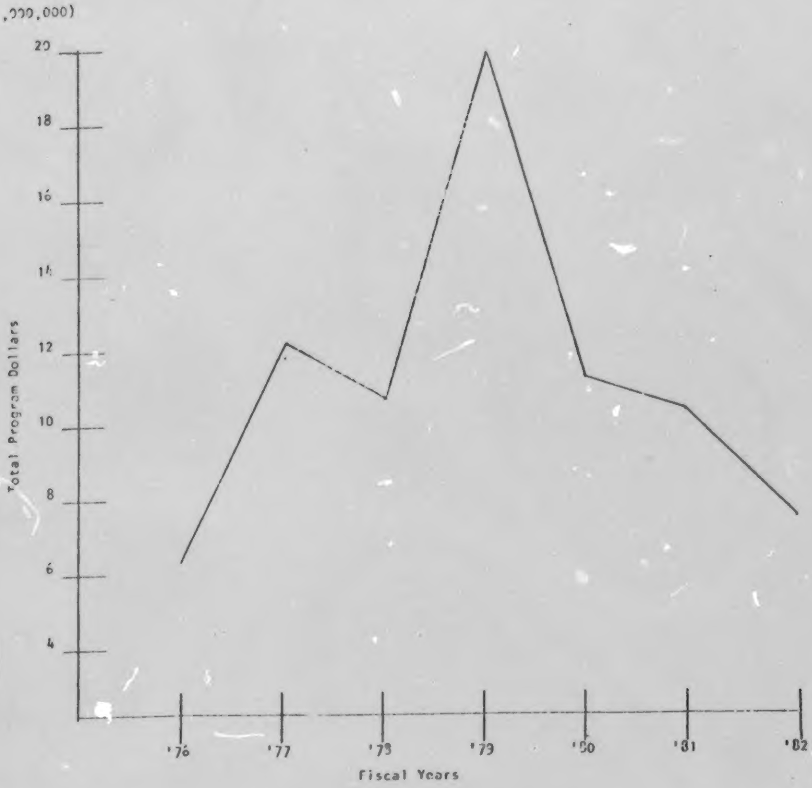
ALL INDIAN PUEBLO COUNCIL, SCHEDULE OF UNDER/OVER RECOVERY FOR INDIRECT COST FOR FISCAL YEAR 1976–80

Period	Fiscal year	Total funding	Indirect total costs	Indirect total allocations	Under/ (over) recovery
July 1, 1975 to June 30, 1976	1976	6, 198, 821	281, 897	281, 897	0
July 1, 1976 to June 30, 1977	1977	12, 268, 454	655, 996	655, 996	0
July 1, 1977 to June 30, 1978	1978	10, 623, 726	1, 069, 688	756, 705	312, 983
July 1, 1978 to June 30, 1979	1979	19, 461, 282	964, 003	965, 436	(1, 433)
July 1, 1979 to June 30, 1980	1980	11, 658, 827	1, 166, 915	937, 208	227, 133
July 1, 1980 to June 30, 1981	1981	10, 410, 428	1, 202, 014	649, 564	552, 431
Subtotal					[1] 1, 091, 114
July 1, 1981 to June 30, 1982	1982	7, 567, 871	805, 000	685, 000	120, 000
Total					1, 211, 114

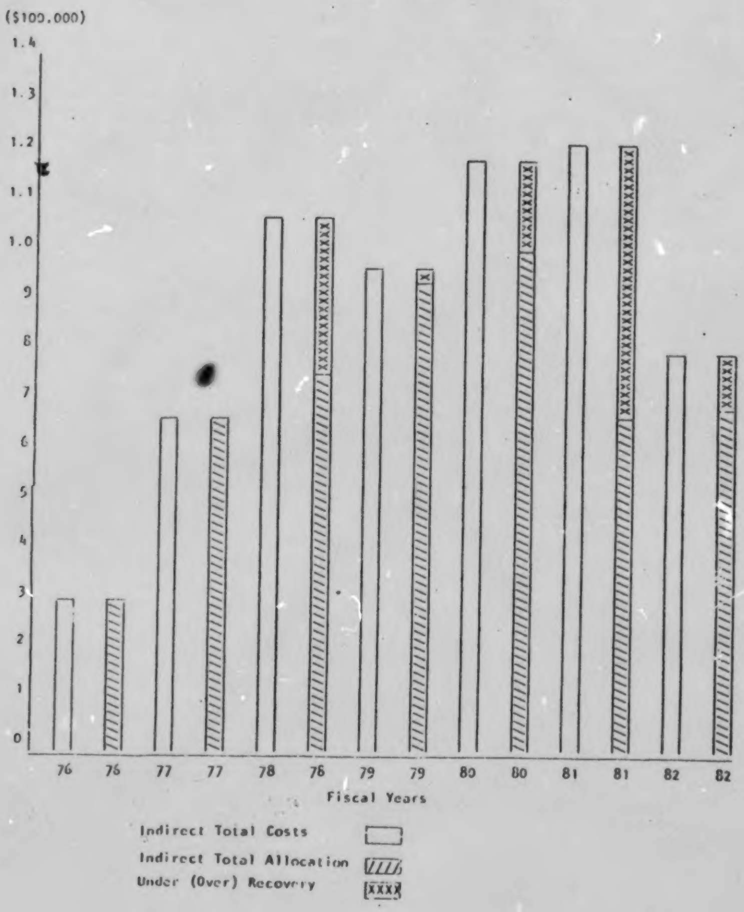
[1] $1,091,114 plus amounts footnoted (1) and (3) on attachment I equal the total of $1,097,844 as reported on the June 30, 1981, financial statements.

Note.—The amount for fiscal year 1982 are estimated based on historical data as of Mar. 31, 1982. The allocation is substantially less than costs because of a lesser rate by the individual funding agencies, mainly BIA, which was less than the rate approved by the cognizant agency (DOL).

ALL INDIAN PUEBLO COUNCIL, INC.
TOTAL PROGRAM DOLLARS/FUNDING
LEVELS FOR FISCAL YEARS '76 - '82



ALL INDIAN PUEBLO COUNCIL, INC.
UNDER/OVER RECOVERY FOR
INDIRECT COSTS



Senator Cohen. Mr. Andrade.

STATEMENT OF RONALD P. ANDRADE, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, D.C.

Mr. Andrade. Thank you, Mr. Chairman.

In the interest of time, Mr. Chairman, we have submitted our statement and I will try to move very fast. I would like to note that with me is Mr. Alan Parker, who has been serving as a special counsel for the National Congress of American Indians today on this testimony.

Senator Cohen. Without objection, your full statement will be made a part of the record of this hearing.

Mr. Andrade. One of our prime interests today is the change in the 638 contracting process, from contracts to grants. As was mentioned earlier in the testimony today, by the BIA, they stated that it was going to be good and there should be no problems, but they were going to try to solve this GSA problem for you.

It is surprising, in the February 25 memo of the Assistant Solicitor, he mentioned that there would be a change in form only, not substance. Following that line of reasoning, there should be no problems with GSA. It would seem to us to be unreasonable on the one hand for the Solicitor to say that there are not going to be any problems in this, and then on the other hand, we have a problem in GSA with property.

He also said it should enhance, rather than diminish the authority of the tribes. Again, that in our opinion would seem to say that there should be no change, no change at all.

In the same sense, though, Mr. Chairman, there is no evidence—even in reviewing the Solicitor's opinion—there is no evidence that Congress specifically considered the tribes in this change, in the cooperative grants act change. There was no indication in any way that we could find that they had particularly considered the status of the tribes, especially the status of the tribes under 638, and under the education amendments, title XI. There were no indications they did. It seems to be purely a decision made by the Solicitor that it does apply, that it is mandated.

I would bring up another major problem that we see in this in that, on a personal note and as an example, in a meeting that we held earlier this year with the BIA regarding contracts, they told NCAI, that they would no longer be able to sole-source contracts, that it had to go to grants, from the State forward. They also said that that meant competitive grant awards from now on out.

It is our indication in 95–224 that it is stated in that fashion, all grants are to be competitive awards. This will totally frustrate the tribes. If the tribes now have to go to competitive awards for every grant they are to receive from now on out, this means that the only thing that is going to increase is the grant-making authorities, proposal writers, proposal consultants, who will now have to be hired by the tribes to write competitive grant awards.

It seems to us to be just an undue burden to place on the tribes at this point.

The contracts procedures under 638 were to be a way of lessening the Federal paperwork. It was to make it much more easy for the tribes to assume programs. But if Interior is going to implement the full language of 95–224, then it does mean competitive grant awards for these tribes, and we think that is just an unfair burden to place on the tribes.

Additionally, in that change, the tribes have, for the last 10 years, been made to set up new administrative structures to apply under 638. They have changed their whole grant-making authorities, their whole grant-operating authorities to comply with 638. That was heralded as one of the most major acts ever for tribes. President Nixon at that time heralded this as the greatest thing that could be done, to turn over greater control to the tribes, and the fastest method.

If BIA is now saying, 10 years later, that we are unheralding 638, I think that should be said. If this bill—if that has been a failure—then I can understand the reason for change. If the only reason it would change is that their Solicitor has ruled that the tribes, that 638 must comply with 95–224, then, fine, that is a different state, that is a wholly different consideration, and I think that then becomes a congressional decision, not the decision of the BIA. I do not believe that it is in their purview to make the decision.

Under the contracting support, section 106(h) of Public Law 93–638 authorizes a funding level for tribally administered BIA and IHS services under specific contracts and not less than the appropriate funds the Secretary would have otherwise provided for his direct operation of the program. This has not occurred.

It is evident from testimony, both by the tribes here and by other testimony in other meetings and every other kind of consultation mechanism that the Bureau has had, that they have failed to provide sufficient funds for the tribes to operate these programs.

As Mr. Little mentioned in his testimony, it is very difficult for the tribe to plan their contract support funds with indirect cost rates when they do not know when they are going to be funded. It is physically impossible for them to plan forward enough when they do not know what their agency-level funding level is going to be, whether their contract is going to go through and at what level. Then they enter in and say, well, we have a shortfall in our contract support funds, so not only did we have to cut back your grant, but now we are going to cut back your contract support, the indirect cost rates.

So the whole method that they have utilized for the tribes has failed. Now to place that onus again on the tribes and say, "It is your fault; it is your fault because you overran." That is really false.

Additionally, I was really amazed by one of the respondents to your question regarding how do you identify what is an indirect cost rate, what is an overhead cost, what is direct operation cost? There are no guidelines for that, and they leave it in that method. I think you can ask any one of the tribal members here who will testify, what it means to get an audit charge, because they incorrectly identified that as an indirect cost or an overhead charge or a direct charge.

Additionally, CETA and some of the other Federal programs have specifically mandated that they will not pay for certain costs even though it appeared to be within the purview of their program. CETA used to put out an indication that they would not pay for an accountant unless he was wholly hired by CETA. Many tribes did that anyway. They shared time. CETA rejected them. As a result, they lost the cost. They had to pay it back.

And yet he responded, well, it is whatever way they kind of work it out on their own. They are causing the tribes either to go to a shortfall or else have them get into an audit situation.

Senator COHEN. What I gathered from that was, it is up to the tribes to determine whether it is indirect, incremental, or administrative, and then they come in later and say it is wrong.

Mr. ANDRADE. Yes. They have both sides. They can make us do it wrong and then they come and audit us and tell us it is wrong. It is a great situation for them and I guess it keeps them in business.

I think our concern is that there has not been adequate guidelines, either developed by the BIA or the Inspector Generals or anyone else, to determine what is direct and indirect cost; what they consider allowable costs under an audit; what they consider to be reasonable charges. They have not done that. There are no guidelines now in existence that we know of. I think it is truly unfair of them to come in and say, well, it is kind of what the tribe decides, because we can point out a whole lot of audits where the tribe incorrectly decided, and no one ever goes back and says, well, it was the Inspector General's fault in the beginning. They just call us incompetent. I think it is really unfair for them to do that.

The last thing, Mr. Chairman, we would like to offer a suggestion as a followup to the American Indian Law Center report. I also want to mention that. One of the other questions you asked of one of the people from Interior was about the American Indian Law Center report, and they said, yes, we are very much going to implement them, we are going to move ahead.

I did not bring these blue binders to look like a Bureau official. They always bring their little binders. This is a report we provided for the Bureau in 1980 on contract support funds. It is essentially covered again in the American Indian Law Center report. Our report went into the files of the BIA never to be seen again in the light of day. They do not mention it now. They have not mentioned it in the last 2 years.

I really question it on one part, that is, whether or not the American Indian Law Center report is not going to go into that same file alongside of ours. They paid for this report. This was paid under contract with the Bureau of Indian Affairs, for NCAI to do field consultation with the tribes in 1980, which we did, and provided to them a report on contract support.

As I said, nothing was done. I was glad to hear them today say that at least the American Indian Law Center report, they intended to review it some more. But I think that is—one recommendation is that we will see them actually implement it.

We would recommend that this committee take every action available to influence the administration to create a working group whose task should be the resolution of those problems relating to terminology confusion and interagency coordination, especially in regard to the contract support, indirect cost rate issues.

This effort should be conducted with the full support and participation of the OMB and the deadline should be the beginning of fiscal year 1983. Starting with the effective analysis contained in the American Indian Law Center report, working groups should be able to put procedures, policies, and guideline changes into effect by the end of 1982. These goals are achievable and there is no reason why such an effort should not be given the highest priority. After all, this administration has consistently and strongly supported the policy of Indian self-determination. To leave these issues to the BIA to deal with alone is to relegate them to the back burner and only token efforts will be made.

Also, we further recommend in the strongest possible terms that this committee work closely with the administration on this effort and schedule a followup hearing immediately after the Labor Day recess to hear progress reports from the administration on this priority matter.

Clarification of the use of terminology in OMB circulars and Federal agency cost allowance guidelines should make it possible to resolve the interagency coordination problem which has resulted in heavy financial and other burdens on tribes attempting to exercise their self-determination rights.

To end this, we do want to join with the other people testifying to draw the committee's attention to the short-fall in the fiscal year 1982 contract support budget. We fear that we will see only more tribes coming before this committee to discuss the short-fall, discuss how they are going to recover that money, and why are we paying to run Federal contracts when we are supposed to be working together, we thought, with them. As a result, we hope that we can get some of the recommendations begun on immediately, Mr. Chairman.

Thank you very much.

Senator COHEN. Thank you very much for your testimony and I agree with you entirely on the subject of form versus substance. If is is only a question of form, going from contract to grant, there should be no problem. If there is a problem, then we should not be changing the form. I was at least pleased to hear Mr. Smith say that they would try to resolve that issue before the regulations become effective. if they become effective. But second, if they can not do that, that they would support a change recommended by the Congress, if we have to do so.

I agree with you on that particular point.

Mr. Parker, do you have a statement?

Mr. PARKER. I am here to accompany Mr. Andrade.

Mr. ANDRADE. For the record, Mr. Chairman, we have backup documents showing Federal agencies, each contract with each agency, how our indirect cost problems were developed.

Senator COHEN. Thank you very much.

[The statement follows:]

PREPARED STATEMENT OF RONALD P. ANDRADE, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. Chairman, my name is Ron Andrade, executive director of the National Congress of American Indians, on behalf of our 180-member tribes, we extend our thanks to you for agreeing to schedule this hearing on the implementation of the Indian Self-Determination and Educational Assistance Act.

Since the implementation of Public Law 93-638 tribal governments have experienced a complex multiplicity of problems in carrying out BIA programs and activities under cost reimbursable contracts. These problems include financial discrepancies and losses as well as administrative and logistic entanglements at the tribal and Federal level. Specific areas of concern involve, an uncoordinated and contradictory indirect cost system, inadequacy appropriation levels, time consuming negotiations, and reimbursement and auditing procedures under 638 contracts which create unnecessary and unfair burdens for tribal contractors.

We realize that much attention has focused on these problems and the often grave financial situation tribes have experienced in regards thereto. Consequently, we will confine our remarks to those major areas of concern which have been identified as constituting the most serious obstacles to fulfilling the essential purposes of the law.

1. In regards to efforts designed to change the 638 contracting process there is currently under consideration proposed revisions within the BIA regulations which will change 638 contracting to a grant process. It has been stated that these changes are mandated by Public Law 95–224, the Federal Grants and Cooperative Agreements Act of 1977. This committee must be cognizant that Indian tribes are not mentioned within the language of Public Law 95–224 and there is no evidence that congress considered its impact on the unique considerations surrounding tribal administration of federal service responsibilities as provided for under Public Law 93–638. The Indian Self-Determination and Educational Assistance Act of 1975 in contrast to the Federal Grant and Cooperative Agreements Act represents clear congressional intent of establishing a tribal right to contract for BIA and IHS programs and services. Nevertheless, if the proposed regulations changes fall within the legal parameters of the authorizing legislation, then the major concern that must be addressed is to insure that they enhance the existing financial and administrative capability of the tribes.

Although we have reviewed previous versions of the proposed regulations, we are not prepared to offer particular comments at this time but would prefer to examine the actual versions when and if they are published in the Federal Register. In the interim, there are a number of general concerns and issues we would like to bring to the committees attention. For example:

Consideration must be given to anticipate problems that emerge at the agency level if the majority of the responsibility is placed upon agency implementation in the granting process. Sufficient autonomy should be provided to prevent the delays involved in agency communication to either area or central offices involving the solution of Tribal specific problems.

Should reclassification of contracts to grants occur, guarantees must be given to insure that Tribal access to G.S.A. equipment is not jeopardized. It is the BIA's responsibility to obtain a waiver which will allow utilization of Government equipment in tribal activities when necessary.

Specific tribal inquiry has also indicated that there is an uncertainty about the differences between contract and grant, and what their differences will mean where 638 funding is concerned.

There is concern about potential conflicts between the proposed regulations and mandates of Title XI, Public Law 95–561.

We have also received tribal questions about the safeguards DOI will implement to insure that tribes which are forced to compete for limited services from their agency offices will be adequately and effectively served under proposed changes.

2. Section 106(h) of Public Law 93–638 authorizes a funding level for tribally administered BIA and IHS services under specific contracts at not less than the appropriate secretary would have otherwise provided for his direct operation of the program. This standard is the key to successful implementation of 638 and must be given the broadest interpretation. This interpretation should be implemented to include a requirement to insure logistical and administrative support of tribal contract activities to the same extent such services are available to the BIA and IHS when they administer such programs. An inventory of the services available to the BIA in operating programs and projects subject to 638 contracting will provide a backdrop in determining the extent of allowable activities and accompanying cost that should be made available to tribal contracting initiatives.

3. The confusion and inequities involved in computing allowable expenditures associated with contract support must be overcome. The allocation of costs into the catagories of direct and indirect has, to date, not been accomplished through any consistent process designed to insure that all tribal contracting activities are fully supported. Requirements that tribes negotiate indirect rates in order to obtain contract support has imposed over recovery losses, costly negotiations, disallowed cost controversies and deficiencies in other agency program support. Further confusion has resulted from definition of terms. Indirect cost has been given vastly differing meanings and a common understanding has clearly been lacking as between federal agencies and tribes and federal officials.

These problems and others have been well documented and discussed in the final study on indirect cost prepared by the American Indian Law Center as support dialog for suggested recommendations therein. Prior to discussion of these recommendations it must be stated that tribal governments articulating their most severe problems have indicated that federal programs outside of DOI/BIA have been the primary source of tribal financial drain. Those agencies who do not pay their fair share of indirect cost or contract support services have placed a severe burden on the already depleted tribal revenues. Implementation of considered solutions must be targeted toward full Federal participation.

Accordingly, we are in agreement with the American Indian Law Centers recommendations 1 through 3 directed toward clarification of terms; recommendations 4 through 8 directed toward pragmatic use of BIA indirect and cost support moneys; recommendation 9 regarding regulatory amendment. Recommendation 10 should be implemented fully to resolve other agency shortfalls in funding programs. We are further in agreement with recommendations 11 through 13 designed to support tribal financial capability. We believe that consideration of recommendations 14 through 16 should involve extensive consultation with affected schools and education personnel. We support recommendation 17 which is designed to accomplish the original intent of contract support funds.

We offer the following as our suggestions as followup to the aforementioned recommendations. As pointed out in this testimony and that of the other tribal witnesses, tribes are actually being penalized for assuming responsibility for the delivery of BIA and IHS services under Public Law 93-638. Even the most competent of tribal officers who fully comply with all applicable grant and contract regulations are not always able to make the system work as Congress intended. We are convinced that the problem is not in the law itself or in the policies adopted by agency officials who are determined to frustrate the law. As you have heard today, this confusion has existed from the very outset in implementing Public Law 93-638. It exists at all levels of the Federal and tribal government and has resulted in conflicting, inconsistent and contradictory policies on the part of the Federal establishment. Of course, there have also been serious funding deficiencies and a constant lack of technical assistance and other types of support for tribal efforts. But, a resolution of the two fundamental problems identified above—i.e. clarification of terminology and interagency coordination—would allow tribes and the Federal agencies to deal directly with the subsidiary problems.

Accordingly, it is our recommendation that this committee take every action available to influence the administration to create a working group whose task should be the resolution of those problems related to terminology confusion and inter-agency coordination. This effort should be conducted with the full support and participation of the OMB and its deadline should be the beginning of fiscal year 1983. Starting with the effective analysis contained in the AILC report, the working group should be able to put procedures, policies and guideline changes into effect by the end of fiscal year 1982. These goals are achievable and we can see no reason why such an effort should not be given the highest priority. After all, this administration has consistently and strongly supported the policy of Indian self-determination. To leave these issues to the BIA to deal with alone is to relegate them to the back burner and only token efforts will be made.

Further, we recommend in the strongest possible terms that this committee work closely with the administration on this effort and schedule a followup hearing immediately after the Labor Day recess to hear progress reports from the administration on this priority matter. Clarification of the use of terminology in OMB circulars and Federal agency cost allowance guidelines should make it possible to resolve the inter-agency coordination problems which have resulted in heavy financial and other burdens on tribes attempting to exercise their self-determination rights.

Should this committee agree with this recommendation and succeed in persuading the administration to commit itself to such an effort, it should include a meaningful opportunity for tribal consultation from the outset.

Finally, we would like to join with the other tribal witnesses in drawing this committee's attention to the anticipated shortfall in the fiscal year 1982 contract support budget. As pointed out in the BIA's own report, this is a recurring problem which impacts a great many tribes who have expended their own funds on approved indirect costs only to find that the BIA simply doesn't have enough moneys left in the contract support budget to fully reimburse them at the end of the contract or fiscal year. We understand that the BIA currently anticipates at least a 15 percent shortfall in this budget yet no request for fiscal year 1982 supplementing funds has been presented to the Congress. Continuation of such a practice after these problems have been brought to light is not only unacceptable but outrageous. If the BIA approves a negotiated indirect cost rate and related tribal contract budget, and then simply throws up its hands at the end of the fiscal year and claims that the funds are just not available, then tribes can only conclude that the BIA is trying to defeat Indian self-determination. While we recognize that this is not an appropriations committee, we hope that every effort will be made to insure that tribes are not penalized for exercising their self-determination rights in this manner again this year. Perhaps a formal request from this committee, in conjunction with the Interior Appropriations Subcommittee, to the BIA for documentation on the steps that are being taken to insure that this problem does not reoccur again this year may be given serious consideration.

Mr. Chairman, we thank you again for the opportunity to present testimony to this committee on these vitally important matters. We believe that with your strong interest and support real significant progress can be made in resolving the obstacles to implementation of the Indian Self-Determination Act as intended by Congress.

Senator COHEN. Next we will hear from panel three. We hope to conclude this panel at 12:30 and then we will recess until Senator DeConcini can come back, at 1, for the remaining people who will be coming from Arizona. Senator DeConcini would like to be present during that time, so we will go until 12:30 and then we will recess until 1.

Mr. Love?

STATEMENT OF TIM LOVE, GOVERNOR, PENOBSCOT NATION, INDIAN ISLAND, OLD TOWN, MAINE

Mr. LOVE. Yes; thank you, Mr. Chairman.

We have prepared testimony which we would like to submit for the record and summarize the major points in order to allow time for others.

Senator COHEN. Without objection, your prepared statement will be made a part of the record of this hearing.

Mr. LOVE. As you know, the Penobscot Nation has contracted with the BIA and IHS for the administration of services under Public Law 93–638, since 1977, and we believe that we have developed, since then, an effective and responsible financial management system that fully complied with relevant regulations and guidelines.

Yet each year that we have contracted, using an approved indirect cost rate, the BIA has not reimbursed all of the indirect cost expenditures owed to the tribe. The cumulative total since 1979 of reimbursed indirect costs owed to the nation by the BIA now amounts to $121,936.

We project, based on the BIA's accounts shortfall for the fiscal year 1982 contract support budget, an indirect cost deficit of $42,000. Notwithstanding this projected shortfall, the BIA has not requested any additional contract support funds for fiscal year 1982, nor have they requested authority to reprogram moneys in order to reimburse tribes.

Senator COHEN. Could I interrupt you just for a moment? Could you tell me, when were you apprised that these indirect costs would not be reimbursable, at what point in time? In other words, we go back to 1975, and now we are in 1982, at what point in time was the Penobscot Nation put on notice that these types of costs are not reimbursable under so-called guidelines by BIA?

Mr. LOVE. Each time that it occurred—it occurred first in 1979, it was during contract negotiations with the Bureau of Indian Affairs.

At that time, they stated that, we will give you the direct cost funds, but we do not have indirect cost money available to us at this point. They had stated that—this was with the eastern area office—they stated that they would request additional money.

Well, at that time, the money was not a lot. And then it occurred again in 1980 and 1981, and in both of those cases it was the same thing. Here is your direct costs, but we do not have any indirect costs. We asked them, well, what shall we do to administer and manage these contracts? Their suggestion was, take it out of the direct costs. And we found—we were quite surprised because it was our understanding that if we had negotiated an indirect cost rate in good faith that they would honor this rate and provide the funding that is required.

Senator COHEN. In other words, they did not tell you that the indirect costs that you had incurred were not allowable, they just said they did not have any money to pay for them?

Mr. LOVE. That is exactly right. And that is what occurred in all three of those years and that is why we have, what we consider a substantial deficit that is finally catching up to us this year. We are in the position, as many other tribes are, where we are going to have to go out and borrow money or use tribal funds. I would point out that the Penobscot Nation, over the past 2 years, has injected over $200,000 in tribal funds to operate tribal government, because we realize there are areas that the Bureau has no responsibility for and we have taken that upon ourselves.

But there are other tribes, I am sure, which do not have the luxury of having some type of income. We have just been fortunate. But it is not our responsibility.

Senator COHEN. Where are you going to come up with the $121,000?

Mr. LOVE. We are probably going to have to go to the bank and borrow it. I mean, to give you an example, just one other point: The past 2 years, the Bureau came in here and asked for $168,000 to run a liaison office in Maine, and they provided $150,000 in indirect cost money. Well, if we can run several contracts with $150,000, how much would it take them to run those same contracts? Not $150,000. They wanted $168,000 for three people in Maine. It is crazy.

Senator COHEN. Why don't you proceed with your statement?

Mr. LOVE. OK. Notwithstanding this projected shortfall, the BIA has not requested additional contract support funds for fiscal year 1982, nor have they requested authority to reprogram moneys in order to reimburse tribes indirect cost funds legitimately owed.

I hope this committee can monitor the situation to insure that the Penobscot Nation and others similarly situated are not financially penalized yet again this year for exercising our self-determination rights guaranteed under the law.

Mr. Chairman, the other major point I would like to bring to your attention is the need to clarify the meaning and the use of such terms as indirect versus direct; administrative overhead versus program costs; contract support versus grant administration; et cetera.

Different Federal agencies have interpreted and applied these terms in different, sometimes conflicting ways, that ultimately work to the disadvantage of tribes wishing to administer such services.

We would support the recommendations made by other tribes and organizations that a priority effort be made by this administration, which has fully supported the policy of Indian self-determination, to clarify the usage of these terms and enforce the necessary coordination between these major Federal agencies the tribes must deal with. These are matters beyond the control of the BIA. They must be undertaken by the Office of Management and Budget.

Senator COHEN. Thank you very much.

[The prepared statement follows:]

PREPARED STATEMENT OF MR. TIMOTHY LOVE, GOVERNOR, PENOBSCOT INDIAN NATION

Mr. Chairman, members of the Select Committee on Indian Affairs, on behalf of the Penobscot Indian Nation I would like to express my appreciation for the opportunity to present testimony on implementation of the Indian Self-Determination and Education Assistance Act, Public Law 93-638. As you are aware, the Penobscot Indian Nation has attempted since 1979 to fully exercise the vitally important rights of assuming responsibility for delivery of basic governmental services provided for under this law. We would like to commend you for agreeing to schedule these hearings at a time when the willingness of Indian tribes to continue along the path of self-determination is being subjected to tremendous fiscal pressures and adversity. If we are not able to rely on the Congress for support and direction at this crucial time I am concerned that the Penobscot Nation along with many other Indian tribes may be so overwhelmed by the bureaucratic obstacles and financial penalties associated with exercising our contract rights under this law that we will be forced to abandon the goals of self-determination as defined by the law.

In my testimony I intend to address the following major points which I believe are crucial to a resolution of the major problems and obstacles associated with the exercise of tribal rights under the Indian Self-Determination Act: The need to establish a uniform definition for the term "indirect costs" and to standardize procedures associated with the system of approving and allocating indirect costs under 638 and other federal grants and contracts. Closely related to the problem of terminology is the need to achieve an on-going mechanism to achieve Interagency coordination in federal grants and contract procedures. Certain questions must be clarified regarding BIA's proposed "contract-to-grant" regulation changes. The impending shortfall or deficiency in BIA contract support funds for fiscal year 1982 threatens to again result in the imposition of a significant financial penalty on the Penobscot Indian Nation and other tribes similarly situated.

INDIRECT COSTS

There absolutely must be an immediate clarification of the terminology associated with the concept of indirect costs in order to achieve both a necessary uniformity in policies between the major Federal agencies which Indian tribes must deal with and a consistency in the procedures for allocating budget support for tribal indirect costs to eliminate the inequitable penalties imposed on tribal contractors simply for exercising their 638 rights.

The Penobscot Indian Nation has consistently complied with all applicable procedures regarding the formulation of indirect cost allocations including the establishment of an approved indirect cost rate with a cognizant Federal agency—the Indian Health Service—and regular auditing of Federal program expenditures. Yet, like so many other tribes, we are penalized for developing such a cost efficient financial and management information system by being required to constantly struggle with Federal agencies other than the cognizant agency, including the BIA, because of differences and discrepancies between the definition and application of such terms as administrative costs, overhead, contract support, etc. We have had the opportunity to review the draft report of the American Indian Law Center prepared for the BIA on the problems associated with indirect cost issues and fully support it's recommendations to expeditiously pursue steps to eliminate these unnecessary discrepancies. The burden should not rest on Indian tribes to resolve these problems. They are the result of a lack of communication and coordination within the federal system and only the federal administration can initiate the necessary steps to resolve these matters. According to the AILC report the key agency with responsibility to take this initiative is the OMB and the appropriate steps should be taken as soon as possible to review their own circulars and guidelines in order to bring the other federal agencies into compliance.

INTER-AGENCY COORDINATION

Along with the priority effort to clarify the meaning and usage of such terms as direct versus indirect costs, program versus administrative funds, etc., the Federal agencies with Indian service responsibilities must be required to institute a minimal level of coordination so to relieve Indian tribes of the unfair burdens of adjusting to the inconsistent and often contradicting grant and contract policies of different Federal agencies. At present, Indian tribes are exposed to great financial risks in the auditing and cost allowance systems which penalize tribes for following approved budgets and guidelines.

Such an effort should be an integral part of the definitional or terminology clarification process discussed above. We are convinced that the groundwork has been effectively provided by the AILC report and a response by the administration should be initiated as soon as possible. The administration has pointedly embraced the fundamental policy of Indian self-determination and it is time to translate promises and rhetoric into practical, concrete courses of action. In this context, self-determination can only mean enabling Indian tribes to exercise their rights to provide basic governmental services effectively and without the bureaucratic obstacles and burdens caused by the lack of coordination on this matter. We fully concur with the recommendation made by the National Congress of American Indians in their testimony that a special, priority effort must be made to create a working group or task force under the leadership of OMB to identify the concrete steps and procedures necessary to achieve such interagency coordination. With the advantage of the record created by this committee's oversight hearings and the study of the AILC, the directions for such an effort are effectively laid out. Significant progress is possible by the beginning of fiscal year 1983 if the administration will demonstrate the commitment to assign a high priority to this matter and not simply relegate it to BIA which lacks the power of enforce implementation across agency lines.

BIA CONTRACT TO GRANT REGULATION CHANGES

Although the present status is unclear, the BIA continues to press for 638 regulation changes which would transform 638 procedures from a contract to grant system into order to comply with the 1977 Federal Grant and Cooperative Agreement Act. Since the final version of these proposed regulations are not officially available, it would be premature to attempt a specific critique, however, there are certain alarming aspects to this proposed regulation change which call for comment.

One year ago, the BIA proposed to implement a consolidated block grant of 638 programs before Congressional appropriation committees. This proposal was justified on cost efficiency and tribal self-determination grounds despite the fact that no consultation with tribal leaders had taken place and concrete evidence of the workability or advantages of this proposal was not provided. Not surprisingly, the Congress rejected this proposal as being too speculative and without legal foundation. It is noteworthy that an important aspect of this proposal was the call for an across-the-board 25 percent budget reduction in those programs eligible for 638 contracting. Subsequently, the Associate Solicitor of Interior for General Law—and not the Associate Solicitor for Indian Affairs—developed a legal opinion concluding that the 1977 Federal Grant and Cooperative Agreements Act required that 638 contracts be changed to grants. This legal opinion was then attached to a series of mailings to Indian tribes in the summer and fall of 1981 along with proposed regulation changes which would make the contract to grant changes. Our legal representatives have analyzed the solicitor's opinion and advised us that there are substantive questions which were not addressed and that the authorities relied upon by the solicitor are questionable. Briefly, their conclusion is that the Department of Interior could have just as easily concluded that 638 should be regarded as an exception to the Federal Grants and Cooperative Agreements Act, especially if the act is to be interpreted as superceding 638 and would then have the effect of diminishing Indian rights to contract. The rule of law is well established that general Federal laws should not be applicable to Indian tribes if doing so would diminish or deny Indian rights unless Congress expressly intends that effect. Administrative discretion should be exercised to give effect to both Federal laws to avoid a diminishment of the Indian right. These questions were not all addressed in the solicitor's opinion. Finally, if the Federal Grants Act clearly applies, why did the department wait 4 years before discovering this and then announce this conclusion under circumstances which give all the appearances of an after-the-fact rationalization for their goal of converting 638 to a consolidated block grant system. We can't see why the same objectives of flexibility and cost-efficiencies in the 638 system can't be achieved without concluding that the 1977 law supercedes 638 and possibly doing damage to tribal rights in the future.

FISCAL YEAR 1982 CONTRACT SUPPORT FUNDING DEFICIENCIES

According to the best available evidence, the BIA now estimates a 15 percent shortfall in contract support funding for fiscal year 1982 yet no request for either a supplemental appropriation or reprograming of funds has been submitted to the Congress. In the absence of either type of request, the Penobscot and many other tribes will clearly be unable to recover indirect costs at the level already approved by the BIA for fiscal year 1982. In short, this tribe and others similarly situated will again be penalized for exercising their rights under 638 by not being reimbursed for real, approved indirect cost expenditures despite our full compliance with all applicable regulations and procedures.

In order to get a true picture of this problem I believe it would be helpful for the committee to understand the impact of these BIA contract support deficiencies at our tribal level. In 1982 alone we are projecting a deficit of $42,000 while the cumulative total since 1979, the year we began exercising our 638 rights, amounts to $121,936. These amounts are truly significant in our perspective while I'm sure the cumulative total nationally must be upwards of $5 million just for this fiscal year. Although BIA contract officers have been willing to allow an adjustment or reallocation of costs from indirect to direct, this has the effect of reducing our direct cost base for the succeeding year. This translates into an overall budget reduction for the tribe thereby reducing our ability to meet service and resource management needs. This system clearly operates to defeat the self-determination policy and penalizes us for exercising our rights.

I understand that this chronic shortage in contract support funding reflects a basic fault with the process and a frustration of intent of the law. In section 106(h) of the Self-Determination Act, Congress mandated that the level of funding for tribally administered services should be at least as much as the agency would have allocated. Since this necessarily included administrative support or overhead, the expectation was that there would be a reallocation of the budget from BIA administrative to tribal contract support. This simply has not happened and the result is a system that doesn't work. Congress is understandably reluctant to continually increasing the contract support budget when they see no evidence of a concomitant decrease in BIA administrative expenditures. Clearly, the only solution is to force a reallocation as intended by the law. While the Congress and this committee will hopefully pursue the necessary long-range changes to correct these problems, we sincerely request that attention also be directed to the impending fiscal year 1982 contract support funding deficiencies. If no action is taken, you can rest assured that the BIA will not fully reimburse fiscal year 1982 indirect costs for yet another year. However, if the issue of contract support funding deficiencies can be effectively addressed for fiscal year 1983 and succeeding years, then a special last time effort and commitment must be made to fully reimburse all legitimate fiscal year 1982 tribal indirect cost expenditures so that a fresh start can be made.

Mr. Chairman, this concludes my statement and I shall be pleased to answer any questions.

Senator COHEN. Ms. Tomah.

STATEMENT OF VIRGINIA TOMAH, TRIBAL COUNCIL MEMBER AND DIRECTOR OF SOCIAL SERVICES, PASSAMAQUODDY TRIBE, PLEASANT POINT RESERVATION, PERRY, MAINE

Ms. TOMAH. I am Virginia Tomah, tribal council member at the Passamaquoddy, Pleasant Point Reservation in Maine.

Some of the things that I would like to address are: No. 1, that 638 was implemented for self-determination of Indian people and passed on to the Bureau to follow to its fullest, and it has not. None of the laws and the regulations have been followed. They have violated them by, first, the proposed draft. The tribes were not consulted as to whether they would go contract or go through grants. We were told that we are to go grants and that is it.

Before the draft grants were released, I called Dale Heald and requested a copy and he told me that I could not have a copy and he said that I would see them when they were in the Federal Register and that I would have 60 days to comment on them. None of our input was considered; our views were not considered. They are telling us what to do again in their own way. They are letting us think that we have self-determination, but yet pulling and taking it and pushing us in every corner and saying, here you are little Indian, here is a little self-determination, letting us feel that we have it and we do not.

I was thinking last night in my room, we are the first Americans of this country, but I really feel like I am a second American because my rights are being violated left and right.

We like the regulations, the 638 regulations, the way they are now. They are workable. They are familiar to all Indian people. And Kenny Smith says, the only major change that he knew of was the GSA problem. So why spend all that money on staff, Bureau money, and doing all the regulations? When the first law was broken, 271, the tribes were not consulted. Their views were not taken into consideration. How could they do this? They broke the first law and I imagine what they are going to do with this. Contracts versus grants, contracts are more legal and more binding. We all have to live up to them legally. We have a recourse. In this our recourse is very unclear. Where do we go after our fair hearing? Possibly nowhere.

Grants, you have to have points for—they are very, very competitive. Again, the Bureau is going to have Indians fighting amongst Indians, instead of working together in unity. They are hurting all the Indian people by this. Insufficient funds, the rules and regulations, not giving TA. I have never been able to get TA from the Bureau. Instead, I have been telling them what some of their rules and regulations are and they do not pay me. Each time I go to the Bureau office thinking I am going to talk to this person who was dealing with it and establish a working relationship, the next month I go back, it is a brand new person and we are starting back from day one. They have got so many staffers in so many positions that they switch at any point that they want, and it is so frustrating.

I really wonder, and I do not understand how they can do this. It does not make sense, wasting all that money, and breaking the law doing it, not letting any of us have our input. And when they say we have our input, they listen to us, but they do not take it into consideration. They will send another guy down to the meeting and the other guy will go through the whole thing again and they do not know what we are talking about.

So we are back at ball one and we have been staying at ball one and not getting further. It seems that we have to fight every step of the way for self-determination which the Senate passed for our benefit. The Bureau giveth, the Bureau taketh, and that is what they will do if we go grants. In 5 years down the line, there will be no self-determination for Indian people. I feel like they are going to send me on a slow boat to China and I will never return.

Thank you.

Senator COHEN. Thank you very much.

Virginia, you have indicated you like 638 the way it is, but that is a little bit of an overstatement, I suspect.

Ms. TOMAH. With a few minor changes.

Senator COHEN. OK, because it is—and I understand being familiar with one system and wanting to stay with that—but even as we listen to the evidence this morning, there are some problems associated with the lack of guidelines. Mr. Love was just indicating that we have no guidelines. They say it is up to you to determine what the indirect costs are, and then come in later and say: No. 1, those are not allowable; and No. 2, we do not have any money. We do have some problems with 638 that should be corrected.

Ms. TOMAH. Yes, they do need changes.

Senator COHEN. Please proceed.

Mr. MCLAUGHLIN. Mr. White Lightning is going to present our testimony.

STATEMENT OF ALLEN WHITE LIGHTNING, TRIBAL COUNCIL MEMBER, STANDING ROCK SIOUX TRIBE, FORT YATES, N. DAK., ACCOMPANIED BY ROBERT W. McLAUGHLIN, SPECIAL ASSISTANT TO THE TRIBAL CHAIRMAN

Mr. WHITE LIGHTNING. Mr. Chairman, my name is Allen White Lightning and I am the chairman of the Standing Rock Sioux Tribe from North Dakota, the finance committee of that particular tribal council. I have with me today Mr. Robert W. McLaughlin, special assistant to the tribal chairman, and also Mr. Alan Parker, who is one of our tribal advisers.

I wish to thank the committee for this important opportunity to provide tribal testimony on issues concerning the indirect cost policies for tribal government. We have attached detailed written testimony described problems and suggesting policy recommendations which we believe can minimize the negative effects now built into existing regulations.

Senator COHEN. Without objection, your detailed written testimony will be made a part of the record of this hearing.

Mr. WHITE LIGHTNING. The Standing Rock Sioux Tribe, since 1977, has utilized indirect cost procedures to finance, in part, tribal government overhead expenditures. Year after year, we have been faced with the same recurring problems which are built into current regulations which I am sure the chairman and the committee are aware of.

Unless corrective action is taken by the Congress and the administration to reduce the impact of inconsistent regulations, tribal governments will suffer not only management setbacks but real financial setbacks as well.

Congress and the administration, like the tribe, must grapple with balancing expenditures with revenue, but unlike Congress and the administration, our tribe cannot exceed total revenue by total expenditures unless we are willing to face the consequences of defaulting on financial commitments we have with many individuals and organizations.

We, of course, have chosen to balance our annual budget. However, this task, which is difficult under ordinary circumstances, becomes almost impossible when sudden shifts in financial obligations of Government agencies to the tribe take place.

The history of these shifts has always been on the short-fall side of the ledger, thus burdening the tribe to replace income already earned with income which must be taken away from other tribal budget accounts. It has always been surprising to me that the Bureau of Indian Affairs, the agency which constantly calls for improved tribal management, is the very same agency which is most guilty of throwing the tribal budget process into disarray. Other Federal agencies, as we have clearly pointed out in our written testimony, are also responsible for contributing to reducing the effectiveness of tribal management.

Standing Rock, therefore, recommends that this committee ask the Office of Management and Budget, in conjunction with the Inspector General's Office, to immediately set up a task force to address serious problems and deficiencies of the indirect cost regulations. This task force should be required to submit their findings and recommendations in a followup hearing before this committee no later than by the end of the fiscal year. We realize this is a minimal amount of time but we believe tribal governments and the Inspector General's Office have at hand the solution needed to solve this serious problem.

We further suggest that any theoretical assessments to the tribe resulting from fixed carry-forward provisions be suspended.

Finally, Senator Cohen, we also recommend that, if possible, Congress appropriate supplemental funds to cover the short-fall amounts in the Bureau of Indian Affairs contract support program. We only suggest this because the tribes have actually earned this income and described problems and suggesting policy recommendations which we have already expended.

Mr. Chairman, at this time I would like to request that Mr. McLaughlin add some comments to my testimony.

Mr. McLAUGHLIN. Thank you, Mr. Chairman. I just have a couple of comments. One is with respect to the American Indian Law Center report. We disagree with that report on two items. First, we do not think that the Bureau or the Inspector General's Office has the capability to develop a statistically reliable ratio that will be applied to all tribes. We think that the situation is just too complex and the present analysis of tribal government expenditures by the Inspector General's Office actually is not a bad system. We are in agreement with that.

Senator COHEN. I think one of the gentlemen testified earlier this morning and indicated that that is a complex area and that it is not subject to an easy formula or resolution by cost ratios.

Mr. McLAUGHLIN. The other comment, with respect to the report, is that we thoroughly disagree to do away with the contract support provisions. In theory, it does not sound like a bad idea, but in reality we think that we are going to be on the short-fall side again if that were actually carried out. It would be literally a reduction in total injections of revenue to the tribes and we believe it would come out of the direct cost base.

Finally, and I guess this is a question to the committee, if the Bureau of Indian Affairs came in and said they were going to default if they did have such contracts, say with your Bath Iron Works in Maine, and not pay them overhead that they negotiated through a cognizant audit agency, which I believe they do—Defense Department contracts are constantly negotiated with respect to overhead allowances—what would be the committee's reaction? The Bureau is simply not going to pay you for what you have earned. They are legitimate costs, you have earned them. Gentlemen from Bath, we just will not pay you. What would be the committee's reaction?

We are providing a service to the United States, the tribe is. I sort of resented the Inspector General's comment this morning that, we are funding tribal governments. They are not. We are providing a service. The United States, through the Bureau of Indian Affairs and Federal agencies and pass-through through State governments, is paying for that service and also paying for a legitimate and negotiated indirect cost rate. We earned that. We are wondering why the United States is not paying us for what we have earned.

Senator Cohen. What is surprising to me is how we can conduct a system not having any specific guidelines. The notion that each tribe is going to set what it considers to be its indirect costs to me is surprising to say the least.

What we ought to have is some sort of uniformity that lays out with specificity those kinds of costs that will, in fact, be reimbursable and there perhaps is the difference between the analogy that you draw between Bath Iron Works and the Defense industry. There, there is a fairly specific set of guidelines. Here we do not appear to have any. What we appear to have is some sort of loose understanding that certain costs will be reimbursable and others may not be.

If Mr. Love is correct, that the only statement he received is that we simply do not have the money, that adds another element to it.

What I think we have to have is some identifiable set of rules. The rules tell you what you can do and what you cannot do in terms of what will, in fact, be reimbursed. And if you do not have those, then you are really at bay, because you do not know what kind of service you can provide and whether or not it will be reimbursable; whether you will have to eat that cost coming out of the central program.

Mr. McLaughlin. Senator, I think those comments are excellent. There are such rules in the existing system but they are not being applied in this instance. We have legitimate expenditures which are allowable, where we earn payments from the Government on those particular accounts. And the Inspector General's Office and all the audit agencies that deal with us have judged those to be allowable.

In our situation—I cannot speak for other tribes, of course, I am not familiar with Mr. Love's situation—in our instance, the Government simply tells us that, we are not going to pay you what we told you we were going to pay you. All of our cost items are legitimate and allowable according to the Inspector General's Office.

Senator Cohen. And what is the rationale they offer?

Mr. McLaughlin. Simply, we are out of money.

And then we have to inject or infuse those short-falls from our tribal budget, and I guess we are fortunate. I think this is what other testimony today was referring to, especially the testimony that you received from Mr. Thayer. They simply had to take from their claims moneys to inject that and I am assuming that Mr. Thayer's accounts were also allowable accounts.

Senator COHEN. Your prepared statement will be entered in the record at this point.

[The statement follows. Testimony resumes on p. 135.]

JUNE 30, 1982.

Hon. WILLIAM S. COHEN,
Chairman, Senate Select Committee on Indian Affairs, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR COHEN: The Standing Rock Sioux Tribe is pleased to have this opportunity to submit oral and written testimony on problems surrounding earned indirect cost payments to the Standing Rock Sioux Tribe. Since 1977, the tribe has utilized the indirect cost accounting rate to determine overhead expenses allowable under OMB Circular No. A-87 and OASC-10, issued by the Department of Health and Human Services. The cognizant audit agency which determines our indirect cost rate is the Inspector General's Office of the U.S. Department of Interior.

Essentially, our problems have centered on the refusal of Federal agencies to fully honor the rates established between the Inspector General's Office and the Standing Rock Sioux Tribe. This, of course, can throw the tribal budget significantly off course during the year as shortfalls occur in indirect cost payments to the tribe. An inability of the tribe to budget effectively usually results in a less efficient tribal management capability.

The present testimony offers suggestions for your consideration on how Congress and the administration may improve, from the tribal point of view, Federal indirect cost policy for Indian tribes.

Sincerely,

PAT MCLAUGHLIN, *Chairman,*
Standing Rock Sioux Tribe.

PREPARED STATEMENT OF THE STANDING ROCK SIOUX TRIBE, SUBMITTED BY PAT MCLAUGHLIN, CHAIRMAN

Over the past 5 years, the Standing Rock Sioux Tribe has experienced serious problems of management and effective budget control directly resulting from the complex and inconsistent agency interpretations of Federal regulations governing indirect cost payments from State and Federal agencies for the administration of contract and grant programs. The tribe, because it has developed centralized administrative and financial functions, is allowed to assess each grant or contract award from the State or Federal source an indirect cost rate. The percentage allowed for tribal overhead costs is determined by regulations as established in the Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government, OASC-10 (hereinafter called OASC and OMB Circular No. A-87. OASC-10 is normally administered by the Department of Health and Human Services for State and local governments by their Office of the Inspector General. Because of the special trust responsibility of the United States for tribal assets, the Office of the Inspector General, the U.S. Department of the Interior has been assigned the role of Federal cognizant audit agent for tribal governments.

The tribe's written testimony will be presented in two parts. The first part will describe in a brief manner the developments leading to problems we now face with the indirect cost rate delivery system. The second part will be an analysis of problems which stem from inconsistent Federal requirements and directives during the actual yearly administration of the indirect cost program by the tribe. This part will also include suggestions on how the program could be improved from the tribal point of view.

Our testimony has been written and prepared by tribal staff and elected officials directly involved in the day to day decisionmaking or problem solving actions necessary to administer the budget and accounting function of the tribe. No outside consultation or assistance was required or necessary in the development of this report. We chose this presentation format so that the committee could receive testimony from an entirely tribal prespective. On the other hand, the following testimony cannot be considered as representing problems perceived by the array of State and Federal agencies which contract with the tribe to provide program services. The report was prepared by Mr. Clayton Brownotter, chairman of the economics committee; Mr. Allen White Lightning, chairman of the health, education and welfare committee; Mrs. Theresa Pleets, finance officer; Mr. Joe Keepseagle, Jr., administrative officer; and Mr. Robert W. McLaughlin, special assistant to the tribal chairman.

BACKGROUND

The growth of Federal transfer payments, the self-determination act, centralized tribal government functions, and the cost allocation plan and indirect cost rates

Prior to 1960, the Standing Rock Sioux tribal government had minimal expenses of tribal government. Most expenses were treated as direct costs to operate the tribal council and chairman's office effectively. Support staff work, when required, was provided by the Bureau of Indian Affairs in an indirect manner. With the advent of Public Law 85-915 in 1958, the Standing Rock Sioux Reservation Oahe Rehabilitation bill, tribal government began to expand services.

The payments received by the tribe for lands taken for the Oahe Dam plus additional rehabilitation funds provided by Congress for social and economic development caused tribal government operations to grow significantly. For over a decade, the interest earned from the principal deposits of the rehabilitation funds was sufficient to pay for tribal government when combined with moneys the tribe earned from leases on tribal grazing lands. However, this began to change when great society programs increased the real overhead expenses of tribal government during the late 1960's and early 1970's but did not provide the government with any cost reimbursement to cover such expenses. The principal of indirect cost accounting was at that time still a foreign concept to tribal financial management. During this period, the acquisition of each new grant program placed an increasing strain on tribal finance but it was not recognized as the tribe did not have a sufficiently sophisticated financial operation which could allocate tribal management and other costs to their original sources when they were of the overhead or indirect nature. Also, many Federal agency programs during this period required the tribe to provide in-kind services or contributions which further depleted tribal cash resources. Because Standing Rock residents rely heavily on income maintenance transfers for income, there was absolutely no taxation during this period. Furthermore, the economic sector which made up the only source of productive income, aside from lease income to the tribe and individuals, ranching enterprise, was subsidized by the tribe to encourage its development and growth. By 1974, the tribe had exhausted its surplus funds from the Oahe Rehabilitation bill primarily as a result of hidden costs to tribal government to pay for the management of Federal grant and contract programs. During the next several years, the tribe overran its budget and drew from principal balances to pay for budget overruns. By 1977, even the principal balances were depleted and either the tribe balanced its expenditures with its receipts or faced insolvency and receivership at the hands of the Department of the Interior.

Faced with the necessity to balance the budget, the tribe, utilizing Public Law 93-638 self-determination management capacity building funds, initiated a major program to reorganize tribal government and centralize the accounting and finance functions. Standing Rock was encouraged in this effort by the Bureau of Indian Affairs and other Federal agencies as they indicated that indirect cost payments to the tribe could be sufficient to pay for allowable costs for tribal overhead expenses if the tribe could identify such costs in a central service cost allocation plan and indirect cost proposal. 1977 was the first year the tribe participated in the new indirect cost and contract support program. Excitement surrounding the new system soon turned to disenchantment and then disbelief when, in 1978, the Bureau of Indian Affairs underestimated the demand for indirect cost payments for tribes by over 50 percent. At that time, the Bureau sent the area offices and tribes official notification that there would be a major reduction in contract support funding and in the case of Standing Rock—because we still had not negotiated a new rate or billed the BIA indirect cost pool for any incurred costs—that our allotment was already depleted as it had been paid to other tribal governments who applied earlier on a first come, first serve basis. The tribe would receive no reimbursements for overhead expenses, the BIA informed the tribal chairman.

The tribal management staff was shocked. The tribe had just completed the full-scale implementation of a complete reorganization of tribal government in an effort to improve management capability and capacity. A centralized accounting system utilizing new computer technology was put in place. New offices for centralized administration and personnel were established. This range of management activity was called for under Public Law 93-638, the Self-Determination Act, so that the tribe would have the capability to take over the management of Federal programs with a certain degree of efficiency and effectiveness, said BIA officials and BIA directives. Contract support and indirect cost payments were integral to funding the overhead expenses required under this new direction so they would be available, said BIA managers before the tribal reorganization.

With no BIA contract support funds available to pay legitimate tribal bills of collection for indirect costs late into the fiscal year of 1978, the tribe received additional news from the Inspector General's Office that since the tribe apparently would not collect the rate which we had finally negotiated from the Bureau of Indian Affairs, we would be severely penalized in future rates negotiations as a remedial action, according to regulations. This is the theoretical fixed carry-forward provision. The total assessment to the tribe would be well over $300,000, negative adjustment for fiscal year 1979, the Inspector General indicated. What had been proposed by the BIA in 1976 as a silk purse had suddenly become a sow's ear in the mind of tribal officials.

The tribe immediately moved to reduce its indirect cost pool expenditures for fiscal year 1978 by closing the administrative and personnel offices and reducing finance office functions. This resulted in ineffective tribal government for the duration of fiscal year 1978. At the end of the fiscal year, Congress passed a supplemental appropriations bill which restored partial indirect cost funds to the Bureau's contract support fund for that fiscal year. The tribe was eventually reimbursed a percentage of the actual expenditures for overhead expenses as a result of the supplemental appropriations bill. However, by this time, the tribe learned the hard way about the inconsistencies and potential danger of the indirect cost program. In the meantime, the Inspector General's Office, realizing the tribe was not a fault, made adjustments which forgave the tribe the now reduced penalty for over-recovering a theoretical $300,000. By fiscal year 1980, the tribe reestablished an indirect cost pool which included expenditures for the original finance office staff, the original administrative office, and personnel office functions.

During the last 2 fiscal years, the tribe continued to learn by experience the problems associated with the indirect cost policy of State and Federal agencies. We will now turn to those issues. Although we are now able to manage the tribal administrative budget more successfully than in fiscal year 1978, many problems associated with indirect cost payments result because of actions or inconsistent regulations beyond our control. It is such actions which have placed in jeopardy once again Standing Rock's fiscal year 1982 budget process.

THE FISCAL YEAR 1982 TRIBAL BUDGET

The tribal indirect cost proposal and an analysis of inconsistent Federal actions and regulations with recommendations for a Federal policy change

For fiscal year 1982, the Standing Rock Sioux tribe established an indirect cost pool budget—shared administrative overhead expenses—minus offsets, of $697,809. The projected direct cost base—tribal grants, contracts, and programs—is estimated to be $3,413,302 for fiscal year 1982. The proposed and accepted rate to the Federal cognizant audit agency was established at 20.4 percent. As of October 1, 1981, the tribe began to expend funds per each indirect cost pool account at the budgeted $697,809 budget level. The indirect cost negotiated proposal accepted by the tribe and DOI's Office of the Inspector General included the standard clauses listed below:

Main provision—By accepting the fiscal year 1982 rate in the attached Agreement, you agree it is your responsibility to collect the indirect costs applicable to each of your programs. Any such costs that are not collected must be funded with your own funds. For the purpose of computing the amount of the carry-forward for fiscal year 1982, we will assume that all indirect costs applicable to all programs have been recovered.

Other provisions—"8. OASC-10 provides that costs approved by the cognizant agency will be recognized by all Federal departments and agencies. However, as pointed out in the limitation paragraph under section II of the agreement, use of the rate on some Federal programs may be subject to statutory limitations. Additionally, indirect cost reimbursements are subject to the availability of funds for the particular funding agencies."

General provisions—"C. Changes: If a fixed carry-forward or predetermined rate(s) is contained in this agreement it is based on the organizational structure and the accounting system in effect at the time the proposal was submitted. Changes in the organizational structure or changes in the method of accounting for cost which affect the amount of reimbursement resulting from use of the rate(s) in this agreement, require the prior approval of the authorized representative of the responsible negotiation agency. Failure to obtain such approval may result in subsequent audit disallowances."

"D. The fixed carry-forward rate(s): Contained in this agreement, if any, is based on an estimate of the cost which will be incurred during the period for which the rate applies. When the actual costs for such period have been determined an adjustment will be made in the negotiation following such determination to compensate for the difference between that cost used to establish the fixed rate and that which would have been used were the actual costs known at that time."

This fiscal year, the tribe manages, in addition to general government functions, 42 contracts, grants, and tribal programs. The breakdown is as follows: (a) 16 BIA contracts and grants; (b) 4 BIA education title I contracts; (c) 7 Indian public health service contracts; (d) 7 other Federal agency programs—Health and Human Services, Agriculture, Energy, Commerce, Labor, and Treasury; (e) 6 State contracts; and (f) 2 tribal programs included in the indirect cost base.

The current direct cost base is approximately $3.5 million. The projected indirect cost payments to the tribe if all direct cost base accounts are fully utilized would be approximately $700,000 at the end of the fiscal year. The adjusted projected income actually received by the tribe due to Federal program actions and inconsistencies is now projected to be $605,200. As of today, June 30, 1982, we are projecting a shortfall of $94,800 by the end of the fiscal year. The tribe is now forced into one of two necessary actions: (1) to inject tribal general funds (which do not exist) into the indirect cost account in the amount of $94,800, or (2) reduce drastically the employees and services which make up the indirect cost pool to cover the indirect cost shortfall. The first action would place the tribe in jeopardy while the second action would cripple the tribe administratively. Nevertheless, without concessions from Federal agencies or supplemental funds to our indirect cost pool, the tribe must take necessary action. To pinpoint the problem, we will discuss in turn indirect cost shortcomings associated with the above listed agency categories.

(a) BIA grants and contracts.—The major problem the tribe has experienced after several years of working with Bureau of Indian Affairs grants and contracts is that agency's inability to project contract support funds accurately. This is not to say that the tribe is not in agreement with the Bureau for requesting special contract support allocations but that they should, if they propose to utilize this special classification, attempt to predict them with far more accuracy than they have in the past. As in 1978, this year in May, the tribe received word from Mr. John W. Fritz that their is less support funds available than needed to satisfy tribal indirect cost provisions. He says there is only 85.2 percent available. This reduced the effective indirect cost rate on Bureau programs from 20.4 percent to 18 percent. The loss, if the tribe permitted the indirect cost rate to be depressed in this fashion, would have been $63,000 in Bureau indirect cost payments to the tribal government. The Bureau action now requires the tribe to extensively modify 14 contracts, to assess each contract the full amount of approximately 12 percent per contract out of the direct cost allocations and reallocate these funds to make up the loss and bring the effective rate back to 20.4 percent. Of course, this requires each tribal director or program supervisor for Bureau grant or contract funds to reduce their program expenditures for services to the people by almost 12 percent. This lack of agency capability in projecting indirect cost capabilities also causes apparent problems with area office contracting officers. Mr. Robert Whitefeather, Aberdeen area office contract specialist, supervising tribal contracts, states, "the present system presents a nightmare to my office during a contract support shortfall situation." Another problem area with respect to BIA contracts is an administrative opinion that tribes cannot assess social services grant funds to pay for required and approved indirect cost injections. This is a problem which we will discuss later which is applicable to other Federal agencies as well. Essentially, the tribe does not believe that existing statutory provisions prohibit tribes from utilizing social service grant funds via modification procedures to pay for indirect cost requirements. There is an inconsistency between the main provision above which requires the tribe to collect every indirect cost applicable to each contract or grant and in the other provision above, part 8, which indicates that cognizant agency approved rates "will be recognized by all Federal departments and agencies." This inconsistency has led to currently unresolvable conflicts between the tribe, the cognizant audit agency, and Federal contract and grant agencies.

We recommend that the Bureau develop flexible policy to compensate for any shortfalls in contract support funds during the fiscal year. One solution may be a mandatory transferring of Bureau administrative funds from their account to the Tribal contract support funds account.

(b) Bureau of Indian Affairs Title I Contracts.—Serious problems exist with contracts such as the Bureau's Education Title I Projects. Agency officials in charge of these contracts indicate that they are prevented by Federal statutory exclusions to pay any more than 8 percent administrative costs. However, the tribe seriously questions this interpretation of existing statutes. We refer here to a report issued by the Bureau titled, Public Law 93-638, Indirect Cost/Contract Support Policy Procedures and Practices of March 1982. This report, prepared by the American Indian Law Center, Inc., concluded that there is a confusion caused by unclear definition of terms on what maximum percentage Federal program agencies can fund indirect costs in support of grants and contracts. We quote from this report: However, it should be noted that we have been unable to identify a single Federal assistance program available to Indian tribes that is prohibited by enabling legislation from paying its full share of indirect costs. The legislative prohibitions are usually in terms of limits on the cost of program administration, administrative costs, or overhead, all of which are quite different from indirect costs as defined in A-87 and OASC-10.

The title I misinterpretation of the statute alone results in a shortfall at Standing Rock of $36,000. This is a heavy burden which the tribe is being asked to pay for what many consider imprecise administrative judgments. We will recommend to Congress that the issue be clarified by Congress or the administration so that the cognizant Federal audit agency rates can be paid in full by this agency.

(c) Indian Public Health Service contracts.—The Indian Public Health Service, like the Bureau of Indian Affairs, has worked hard to enable the tribe to receive adequate indirect cost payments. As a matter of record, every contract the tribe now holds, with one exception, is paying the full indirect cost rate to the tribe. The one exception and one we must question is a program function, the director of tribal health programs, which is being contracted to the tribe out of IPHS indirect cost pool funds. Officials of the IPHS have determined that they cannot pay indirect cost payments on funds originating or identified as indirect cost pool funds (contract support funds) at the agency level. We believe this situation should not be excluded from having to pay necessary costs incurred by the Tribe to administer and service that cost account item.

(d) Other Federal agency programs—The tribe currently contracts with the Department of Health and Human Services, Agriculture, Energy, Commerce, Labor, and Treasury. These non-BIA and IPHS special Federal contracts and grants pose serious problems to the tribe. They, like the title I education contract, claim special statutory language in their authorizing legislation which prevents them from paying a full indirect cost rate to the tribe. The tribe, nevertheless, must administer every such contract no differently from BIA or IPHS programs which pay the tribe the full rate. Our recommendation, for example in the instance of the Low Income Home Energy Assistance Act of 1981, Title XXVI, the Omnibus Budget Reconciliation Act of 1981, states that, in section 2605, subpart A, the tribe may use for planning and administering the use of funds available under this title an amount not to exceed 10 percent of its allotment under its title for such fiscal year. We believe, as above, that such statutory language does not apply to the indirect cost requirement set forth by the cognizant Federal audit agency. Again, we request that all like determinations by Federal agency officials be resolved in favor of the tribe receiving its full negotiated indirect cost rate.

(e) State contracts.—The tribe has experienced difficulty with Federal contracts which pass through the State governments. To completely alleviate these problems, the tribe has gone on record since 1972 requesting direct Federal funding of all programs to the tribe. However, several grant and contract programs continue to pass through the State funding hierarchy. The tribe considers these passthroughs to be inefficient and not as effective as they might be if directly funded to the tribe. The tribe currently has six State contracts of which three pay the full indirect cost rate and three do not. The tribe reads OASC-10 to require that the State fund the full indirect cost rate to the tribe. We quote from section 1, page 4, the following: In some instances, the lower tier organization may itself be the direct recipient of Federal grants or contracts and will have had its central service and/or indirect costs approved by the Federal Government. In such cases, a higher tier State or locality may generally rely on the determinations of the Federal Government and should contact the Federal agency which approved the costs to assure that its determinations apply to the higher tier organization's situation.

It is our determination that the above requires the State to rely on the Federal cognizant audit agency's determination of the tribe's indirect cost rate. We believe Congress and the administration should clarify the State's obligation to pay the full indirect cost rate to the tribe under this regulation.

(f) Tribal programs.—The tribe pays the full assessed rate of 20.4 percent on every tribally funded program it administers.

(g) Relations with the Federal Cognizant Audit Agency—Inspector General's Office, DOI.—Over the past 5 years, the tribe has had amicable relations with the Office of the Inspector General with regard to the indirect cost program. We believe the OIG has treated the tribe fairly, but has been constrained by certain inflexible regulations in OASC-10 and OMB Circular No. A-87. Congress and the administration should consider modifying these regulations to take into consideration several unique aspects of tribal governments. First tribal governments have varying rates of income dependency. Income dependency is measured by the per capita percentage of income maintenance or transfer payments necessary to maintain minimum standards of living. At Standing Rock, the income dependency is unusually high and estimated to be about 90 percent of total income. Because of this fact, tax revenues to tribal government are miniscule. Other revenues are limited. Therefore, the relationship between indirect cost payments and other sources of revenue are not similar to the ratio existing, for instance, at the State level. Because of this unique condition, shortfalls in earned indirect cost payments to the tribe have a much greater impact on the tribal budget process. To allow for unforeseen changes in indirect cost receivables, the regulations should be modified to permit a much greater flexibility to change the approved indirect rate easily through a simple negotiation during the fiscal year. In addition to this flexibility, regulations and guidelines should be drawn up which eliminate any theoretical over-recovery losses which could be assessed the tribe. In the development of new regulations, careful consultation with the OIG is critical. The cognizant audit agency, at least in region VIII, understands the tremendous burden existing regulations place on tribal governments who have high rates of income dependency.

RECOMMENDATIONS FOR THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS OVERSIGHT HEARINGS ON INDIRECT COSTS

1. It is recommended that OASC-10 and OMB Circular No. A-87 be revised to take into consideration the unique aspects of tribal governments under income dependency conditions. Increased flexibility to adjust the direct cost base, the direct cost pool, and rate should be allowed as funding circumstances change during the course of the year. Less attention should be given to adjustments after the fiscal year such as required by the fixed carry-forward regulations as they result in large theoretical adjustment balances assessed the tribe.

2. The Bureau of Indian Affairs should develop policy which will eliminate mid-year or end-year shortfall announcements. Mandatory fund transfers from regular Bureau administrative accounts should be made to the tribal contract support account if shortfalls develop. At present, the tribe sees only tribal contract and grant program services being curtailed when shortfalls occur while seemingly the Bureau continues without reductions in force or administrative overhead reductions. In theory, Bureau supplemental overhead should be reduced as tribal contracts are put in place. This has not always been the case and a mandatory funds transfer would make this a reality while preserving the integrity of the tribal budgeting process.

3. Congress and the Administration shoud move to correct administrative and agency misinterpretations of statutory provisions which apparently do not restrict the payments of agency to tribes for indirect cost purposes. A study by the American Indian Law Center has indicated that there are no legislative prohibitions which limit agencies from paying their full share of indirect costs. The regulations for agencies which administer the CETA, LIHEAP, Headstart,

Weatherization, WIC, and Elderly programs should be clearly drawn up so that these agencies pay their full indirect cost rates to tribes.

4. Federal grants should be funded directly to tribal governments. State pass-through grants only result in greater cost to the federal budget, a move away from tribal self-determination, unnecessary bureaucratic inefficiencies, and at times, conflicts which lead to sour relations between state governments and tribal governments. During the interim, however, all pass-through grants should be required, as provided in OASC-10, to pay the full Tribal indirect cost rate.

5. The Standing Rock Sioux tribe agrees with other tribes and national tribal organizations in recommending that an OMB level task force be immediately set up to deal with the problems tribes now face with the indirect cost program. This task force should be required to submit to the Senate Select Committee on Indian Affairs their recommendations within 2 months, during a followup hearing to this present oversight hearing. This is possible because the tribes and the Inspector General's office have already given considerable and detailed thought to this matter.

6. Because of the extensive shortfall payments existing in the Bureau of Indian Affairs and other Federal agencies, tribes should be forgiven any negative theoretical fixed carry-forward assessments.

7. Congress should, as in 1978, contemplate a supplemental appropriation to the Bureau's contract support pool to provide tribal governments with indirect cost funds for expenditures already incurred by tribal governments.

Senator COHEN. Ms. Zion?

STATEMENT OF ROSEMARY ZION, ASSISTANT DIRECTOR, NAVAJO DIVISION OF EDUCATION, WINDOW ROCK, ARIZ.

Ms. ZION. Yes, Mr. Chairman. My name is Rosemary Zion and I am here on behalf of the Navajo Tribe's Division of Education. I am here in place of Mr. Lawrence Gishe who is the executive director of the Division of Education. I am his assistant. Mr. Gishe sends his regrets that he is unable to be here in person today.

I would like to comment to the committee both about the proposed changes in the Self-Determination Act regulations and the proposals for changes in funding indirect and other administrative costs, both of which are being considered by the Bureau of Indian Affairs and are before this committee.

I think I would like to preface these remarks by saying that many of the complications that we are hearing about today, and many of the unanswered questions that are floating about today could be simplified. I am not going to say eliminated, but could be simplified if, on the one hand, the Bureau of Indian Affairs were to follow the law in the way in which contractors with the Bureau of Indian Affairs are required to follow the law under the Self-Determination Act—and I will explain what I mean there—and if in fact the consultation process between the Bureau of Indian Affairs and tribal governments and tribal organizations who contract with the Bureau were conducted effectively.

In preparing the testimony that we have drafted for this committee, the Division of Education has followed the practice of consulting very actively with other education contractors within the Navajo Nation who are affected by these 638 contracts, and we get a lot of good information, and we clarify a lot of misunderstandings, and we tend to come out of those consultative meetings with a better idea of what we are doing.

I would really recommend that process which we have used in developing our testimony to the Bureau of Indian Affairs in developing its recommendations, and in developing its procedures for funding indirect costs. It works very well. That has not been what has happened in our experience.

As an example, the way in which we acquired a draft, what I believe is the latest draft, May 21, of the proposed Self-Determination Act regulations, is that somebody I knew, knew somebody, who got a copy of them and Federal Expressed the thing to me. I got it Monday of last week. It was available to start to be worked on Tuesday of last week.

Mr. Dale Heald from the BIA had been out in Flagstaff, Ariz., last February discussing the Self-Determination Act regulations. At that time, the division asked him when we could have a copy of the most recent draft. We were told the same thing that Ms. Tomah was told, when it came out in the Federal Register. If we had followed that, we would have had to come to this hearing to testify about these regulations without seeing them. That is not consultation as we understand it. It poisons the water of the whole working relationship between the Bureau and the tribes. You just feel uncomfortable with regulations you have to get that way.

It is harder to get an understanding of what they mean. This has been our experience and I really think it is a tremendous complicating factor in this whole question of changing the regulations and in funding indirect costs.

Now, we have prepared written testimony on both these matters and have developed some recommendations. I would like to go over, in particular, the recommendations. Our testimony gives our general reaction and we have also undertaken an analysis, point by point, of the American Law Center report, and the recommendation it makes, and of the proposed Self-Determination Act regulations, which I will not go into, but I would encourage the committee and its staff to look at because there are a lot of questions that have been raised in our minds by going over these documents.

Senator COHEN. Could I inquire what your time schedule is? I know I was going to recess this meeting at 12:30 and then allow Senator DeConcini to come and listen to your testimony. I was wondering if 1 p.m. is bad for you?

Ms. ZION. No.

Senator COHEN. I would like to have you withhold it since I know that he would like to hear the testimony of some of the western tribes and cannot get here before 1.

Ms. ZION. I am certainly more than willing to wait for Senator DeConcini.

Senator COHEN. Thank you very much. I appreciate it.

Your entire statement and the studies you have submitted will be made a part of the record of this hearing.

[The material follows. Testimony resumes on p. 151.]

PREPARED STATEMENT OF THE NAVAJO DIVISION OF EDUCATION, PRESENTED BY ROSEMARY ZION, ASSISTANT DIRECTOR

INTERPRETING THE INDIAN SELF-DETERMINATION ACT: A COMMENTARY ON THE PROPOSED NEW "93-638" REGULATIONS

Members of the select committee, for almost a year, the Bureau of Indian Affairs has been announcing its plans to make significant amendments to the regulations implementing the Indian Self-Determination Act, Public Law 93-638.

These plans have been based, at least in part, upon a solicitor's opinion holding that the Federal Grants and Cooperative Agreements Act of 1977 requires that agreements between the Bureau of Indian Affairs and Indian tribes and tribal organizations for the administration of programs otherwise operated directly by the BIA must be in the form of grants rather than contracts. This opinion has been questioned by many Indian tribes and organizations for reasons which will be discussed in this testimony.

Any change in the rules and procedures for administration of the Self-Determination Act is a matter of great concern to tribal education agencies such as the Navajo Division of Education, and to community controlled contract schools operated under Self-Determination Act contracts. With any change in procedures, there are a number of questions which must be answered before tribal educational agencies and contract schools can determine if their situation has been made better or worse. What will be the effect of the new regulations on eligibility for related services (such as GSA vehicles, facilities maintenance)? What will be the effect on the ability of tribes and tribal organizations to make policy, use money effectively, deal with problems of carryover?

Often these questions cannot be answered by merely reading the new and old regulations. They require discussion and interpretation of the effect on other laws and regulations. Often the tribes and tribal organizations are more sensitive to the relationship between the Self-Determination Act rules and other Federal laws and regulations than are the Federal officials.

Under these circumstances, it is clearly unreasonable to expect Indian tribes and tribal organizations to go along with and given their approval to any new regulations under the Self-Determination Act unless they have been involved in the development of those regulations in a meaningful way. I almost hate to use the word "consultation". It has been so often misused. Briefings after the fact have too often been called consultation. Information sessions in which no information is exchanged and no ideas accepted from the floor have been called consultation.

Actually, some of the best consultation the Navajo Division of Education had with the Bureau, has been the unofficial acquisition from non-BIA sources of BIA documents not yet scheduled for public release. This is how we first learned about BIA proposals to close several BIA-operated schools on the Navajo Reservation. This is how we learned about the ideas underlying the BIA 1983 education budget proposal. And, most recently, this is how we have obtained what we believe is the most recent draft (May 21, 1982) of the BIA's proposed new Self-Determination Act regulations. Only a cynic or a humorist would call such a process consultation.

Therefore, the first thing we would request of you as the committee charged with oversight of the BIA is to hold that organization to its obligation to work with Indian tribes and organizations in implementing the Self-Determination Act. It is not enough to present a draft and hold an information session after it is written, as was done last fall with an earlier version of these regulations. It is not enough to offer verbal assurances to tribes and tribal organizations that their concerns will be addressed while failing to provide them with the actual proposal for the regulations. This latter was our experience last winter when a BIA representative addressed a gathering of Indian educators in Flagstaff, Ariz. Rather, the BIA must be prepared to sit down with Indian tribal representatives and representatives of Indian organizations and work out implications of proposed regulatory changes. Unless this is done, it is unreasonable to expect Indian tribes and organizations to accept changes in one of their basic working documents for dealing with the Federal Government.

As stated earlier, the Navajo Division of Education obtained the draft of the Self-Determination Act regulations upon which we base these comments unofficially, from a source outside the BIA. We received it only last week. It has been impossible so far to give the document the careful analysis it deserves. There has been no time to hold work sessions with other Indian education leaders or tribal officials or even all the key members of our own staff to give the current draft of the proposed regulations the thorough going over it requires. Therefore, these comments on those proposed regulations must be based upon the hasty analysis which the Navajo Division of Education has undertaken in-house and on short notice.

The gist of the BIA argument for changing the system of contracts to grants is that the change is required by the Federal Grants and Cooperative Agreements Act and that the changes are merely procedural in nature, not substantive. We are not certain that either of these contentions is correct.

It is not at all clear that the Federal Grants and Cooperative Agreements Act requires the change from contracts to grants for the Self-Determination Act. Appended to this testimony is an analysis of this issue undertaken by the Division staff (Appendix B). This analysis demonstrates that solid legal principles support the unique status of Indian affairs legislation such as the Indian Self-Determination Act, and its legal protection from implied repeal or amendment by laws of general jurisdiction.

It is important to realize that Indian affairs statutes are the successors of treaties between the United States and Indian tribes. They are the means for spelling out the unique relationship between the Federal Government and Indian peoples. If they can be altered in their implementation by statutes which do not even mention Indian tribes, or the affected Indian laws, then these treaties can be unilaterally altered or eliminated without any notice to the Indian tribes and peoples who rely on them. We do not believe that this is consistent with the current state of Indian law, or with the rights of Indian peoples in dealing with the United States Government.

In addition, we are not convinced that the Self-Determination Act contracts to provide services otherwise provided directly by the BIA fall comfortably within the defintion of "grant" contained in the Federal Grants and Cooperative Agreements Act. These contracts are for tribal and local administration of programs which the BIA would itself have to administer, but for the Self-Determination Act contracts. The Self-Determination Act specifies "contracts" for these agreements, and "grants" for the ancilliary agreements available to help tribes and organizations plan for self-determination act contracts. We believe it is significant that the Indian Health Service of the Department of Health and Human Services has come to the conclusion that "because of the service-delivery nature of its programs, the utilization of contract agreements under Section 103 (25 U.S.C. S450g) of the act is consistent with the Federal Grants and Cooperative Agreements Act" (a quote from the introduction to the proposed amendments to 25 CFR Part 276 in the "unofficial" copy of that document). Certainly the same arguments which justify the position of the Indian Health Service apply to the delivery of education services in BIA funded schools and educational programs.

Finally, it is not at all clear that the change from contracts to grants carries no substantive changes in the basic terms of the relationship between Indian contractors and the Federal Government. The original draft of the regulations contained many substantive changes in that relationship affecting rights of appeal, ability to carry forward funds, availability of government property. The more recent draft has corrected many of the problems which the earlier draft created. But it is still not clear that the change to "grants" will not affect program.

Some of our contract schools have been told that as grantees they are not entitled to GSA vehicles. Use of GSA vehicles is critical to helping some of these schools break even. While appeals rights have been improved over the first draft, it seems clear that grantees will not fall under the coverage of the Contract Disputes Act of 1978, which, absent the change to grants, would be applicable of Self-Determination Act contracts under the provisions of 25 U.S.C. S450j(a). In the absence of a comprehensive review of the consequences of "grants status" and "contract status" of an agreement, it is impossible to know what additional unanticipated effects the change may have.

As stated earlier in this testimony, the late acquisition of the most recent draft of the Self-Determination Act regulations has left the Navajo Division of Education little time to analyze and interpret the draft. Therefore, any comments on the specific language of these proposed revisions will of necessity be cursory in nature. We would urge this Committee to make copies of the latest regulation draft available to Indian tribes and Indian contractors before the regulations are published in the Federal Register and to keep the record of this hearing open for a reasonable period of time to solicit more comprehensive comments on the regulations.

We do want to cover a few points, however, in regard to this draft. Many of the worst faults of the earlier draft have apparently been corrected. Grantees are no longer required to choose between a formal and informal hearing if they appeal a local decision. The obligations of the Bureau in regard to retroceded grants have been reinserted. The right of Indian people to have access to the records of the programs that serve them has been reinstated. We have discussed these questions in the comments attached to this testimony as appendix A. We hope you and your staff will review those comments with care. However, a cursory review of these proposed regulations identified a number of remaining problems and questions.

CONCLUSION

In conclusion, we would urge this committee to reject the Bureau of Indian Affairs argument that the Federal Grants and Cooperative Agreements Act requires a change from contract to grant as the basic mechanism for implementing the Self-Determination Act. This argument has already been rejected by the Indian Health Service as inappropriate. It should be rejected for BIA education programs (and other contracted programs) as well.

In regard to those areas where more specific changes are proposed in the regulation, the Bureau should be required to work in concert with Indian tribes and tribal organizations to develop appropriate changes in the regulations. There are some welcome changes in the proposed regulations, as well as many questionable ones. Efforts should be taken to preserve the best of the proposal while eliminating the inappropriate parts. While effective consultation is admittedly time consuming, it is surely less tedious than drafting proposals in isolation only to have them rejected time after time by the persons who must live with them. Finally, we would encourage you to leave the record open for a time and see that the BIA sends copies of its proposed regulations in their current form to Indian tribes and tribal organizations so that you may receive more complete and effective commentary.

Accompanying this testimony is a summary of the recommendations of the Navajo Division of Education regarding amendment of the Self-Determination Act regulations. I hope you will give them serious consideration. Thank you.

APPENDIX A.—COMMENTS ON SPECIFIC BIA PROPOSALS FOR AMENDMENTS OF SELF-DETERMINATION ACT REGULATIONS

I. PART 271

Most of these comments will deal with the changes to Part 271 of the regulations, since this part is the heart of the existing contracting procedure. In review of this part, we have identified the following concerns and questions:

1. Role of the area director and area education director

The draft regulations we reviewed are consistent only with the pre-realinement structure of the BIA. A number of functions are identified for the Area Director or the Area Education Program Administrator. If the BIA does complete its realignment, all these provisions will have to be changed to reflect the new administrative structure. It is not completely clear to us how the realignment will affect procedures under the regulations for moving a controversy up one level in the BIA hierarchy. Where will the Area Director's functions go? To the agency or the region? Will the role of the Commissioner be delegated to the region or remain in Washington?

2. Replacement of specific contract application requirements with OMB circulars

This is a great concern to Indian contractors. At this time contract application and administration requirements are spelled out in the Self-Determination Act regulations. They cannot be changed without a notice being published in the Federal Register, an opportunity to comment, et cetera. An OMB circular can be amended without notice, comments, or publication. In addition, these circulars are not necessarily applicable for the kinds of contracted programs with which the Self-Determination Act contractors are involved. (We do not know of any other Federal grants that are given for the complete operation of an elementary school or high school.) We fear that this change will invite misunderstanding. We also note that the specific requirement that agency and area directors provide to applicants forms and information on all application requirements has been deleted. We would suggest reinstating this provision so that applicants can be assured they have been fully informed of the requirements to which they can be held.

3. Funding information

We note from this draft that the Bureau is still not willing to commit itself to supplying potential contractors (or grantees) with information about all funding "the appropriate Secretary would have otherwise provided for his direct operation of the program", as required by the Act. This information is essential.

4. Convenience to grantee

While grants are usually described as simpler for the grantee than contracts are for the contractor, the proposed regulations actually place more specific management requirements on the grantee than the existing regulations do on contractors. Some of these requirements may be a good idea, but their growth seems inconsistent with one of the rationales for changing to grants. In addition, the regulations appear to make it more difficult for tribal organizations to negotiate three year agreements, by increasing the specificity with which the tribal government resolution must approve a three year agreement.

5. Powers of the agency director, area director and Commissioner

The new draft clearly places greater power with the agency director and area director and reduces the role of the Commissioner of Indian Affairs to essentially an appellate role. What will be the effect of realignment on this proposed distribution of power?

6. Role of the area director for the Navajo area

The Navajo tribal government has a particular problem in dealing with the BIA because there are five agencies within the Navajo Nation, a situation faced by no other tribe. For individual contractors within the Navajo Nation, it is clearly appropriate to deal with the agency director in regard to contract or grant applications. For the Navajo Tribe, however, it is clearly more appropriate to be able to deal with the area director and area education program administrator for any contract application. It is not clear from the draft that the tribe may do so. In one place the regulations state that application is made to the area director if a tribe has more than one agency within its boundaries. But in other places the regulations seem to state that applications can be made to or decisions made by the area director only if more than one tribe is involved in the contract or grant and is located in the area.

7. Starting date

The proposed regulations set the starting date for a grant as the latter of the next fiscal year or the starting date on the application. This could cause difficulty for education contracts or grants. The Federal fiscal year is terribly inappropriate to the school year. The school year starts in August. The fiscal year really should start in July. These regulations can result in a contract or grant which either starts well into the school year or must be delayed for an entire additional year to conform to the starting date requirement. The present requirements that an application be made 120 days in advance of implementation if BIA personnel are affected should be sufficient.

8. Savings

The language about what is done with "savings" has been changed. The regulations currently provide that any savings shall be used to provide additional services. The proposed regulations state that savings may be used to provide additional services. It is important to find out if this language change means that the BIA may require savings to be returned to the federal government, a position which appears inconsistent with 25 U.S.C. S450j(h).

9. Direct and indirect costs

Although the proposed new section mentions indirect costs in the heading, it does not address indirect costs in the body of the regulation. When an appropriate plan for funding direct costs is developed, it should be incorporated into the regulations. Again, the proposed regulation appears to shortchange contractors by authorizing them to receive direct costs not less than the Bureau would have provided for direct operation of the program, thus omitting the "secretarial level" funds which are required by 25 U.S.C. S 450j(h).

10. Use of government property

It is good to see that the BIA has reinstated in this draft the right of "grantees" to use government property. However, it is our understanding that the GSA continues to maintain that as grantees, contract schools will not be entitled to GSA vehicles.

11. Appeals

As stated earlier, this draft reinstates the right of a grantee who seeks an informal hearing on his case to later have a formal hearing. It would appear that the Commissioner of Indian Affairs will serve basically a review function, rather than offering de novo consideration of a dispute. It should also be noted that contract dispute mechanisms provided for by federal law will probably not be available to a grantee.

12. New school starts

There is a whole new subpart dealing with criteria for school expansion and new school starts. Since the whole section is so new, it is difficult to comment on it. We would like to receive a great deal more information on what this subpart really means, how it will be implemented. We are concerned that any criteria for new school starts and expansions be developed in close consultation with Indian tribes, community schools, and communities. Some of the criteria contained in this part would be very hard for a small community school to satisfy because the Indian Student Equalization Formula is not designed to provide adequate funding to small, community day schools. Yet, small community day schools may be the most appropriate form of elementary education for our children. Some language in this subpart could be used to justify "dumping" Indian children on public schools rather than constructing new BIA funded schools. It is important to make sure that school start criteria and funding formulas are supportive of appropriate educational environments for Indian children in their actual situations. We would like to see this section stress a great deal more the role of tribal educational planning in determining the appropriateness of a new school expansion. It should be the Indian people and their government and communities who determine the appropriateness of different kinds of schools for Indian children. Missing from the section is a BIA commitment to provide adequate schools and schooling to all eligible children seeking such services.

II. PART 272

We have few comments on this part, since it deals basically with grant procedures for what the Self-Determination Act also calls a grant. We would recommend, however, that the comments on the role of the agency director, area director and Commissioner, and the particular situation of the Navajo Tribe, discussed in regard to part 271 be applied to part 272 as well. In addition, we would suggest some specific provision in this part for identifying certain grant funds as available for education programs, and specifically grantable through the office Indian education programs and its agents. This would conform better with Public Law 95-561 and published BIA policy and would alleviate some problems we have had in the Navajo area with personnel outside the education line of authority deciding on education grants.

III. PART 273—JOHNSON O'MALLEY PROGRAM

We have not had time to review the proposed regulation with the Johnson O'Malley Program staff for the Navajo Division of Education or our local subcontractors. Some of the proposed changes are welcome, such as the greater specificity in education plan requirements, and the clearer delineation of who is responsible for what. However, we feel that efforts should be taken to shed more light on what the rules are when, as in our case, an Indian tribe has the prime contract for Johnson O'Malley programs for its children and local schools and Indian Education Committees subcontract from the tribe. Questions as to who must have an Indian Education Committee (must the tribe have one also?), who holds insurance, who approves program items, could use some refining and clarifying.

IV. PART 274—SCHOOL CONSTRUCTION

This part contains some positive changes, most particularly the recognition that in a rural reservation area minimum school size must be kept small if community schools are to be a reality. This part should be coordinated with the new subpart G of part 271 on new school starts and expansion, particularly to assure that the recognition of the need for small schools contained in part 274 is a guiding influence for new school starts as well.

V. PART 275

We have no comments applicable to this part at this time. The changes appear merely technical.

VI. PART 276—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS

There is a great deal of concern with this section. Rather than spell out grant requirements, it basically refers to different sections of OMB Circular A-102.

This circular is subject to amendment without appearing in the Federal Register, without notice of change, or opportunity to comment. We feel that this is an inappropriate way of dealing with Indian contractors. We are not prepared at this time to review all the ways in which the attachments to the OMB circular create new or different requirements for Indian education contractors. We do feel, however, that these new requirements have been developed essentially for agreements different from Self-Determination Act contracts and that they may be changed without input from Indian contractors. This clearly makes the change from regulations to circulars inappropriate.

VII. PART 277—PUBLIC SCHOOL CONSTRUCTION

We have no comment on this section except to note that any changes in this section ring a little hollow in light of the Bureau's failure to seek any funds for public school construction. What is needed is construction funds.

APPENDIX B.—THE RELATIONSHIP BETWEEN THE INDIAN SELF-DETERMINATION ACT AND THE FEDERAL GRANTS AND COOPERATIVE AGREEMENTS ACT

AN ANALYSIS BY THE NAVAJO DIVISION OF EDUCATION

The Bureau of Indian Affairs proposes to make major amendments to its regulations contained in subchapter Y of title 25 of the Code of Federal Regulations—the regulations implementing the Indian Self-Determination and Education Assistance Act. The occasion of these proposed changes is an opinion by the Deputy Solicitor for the Department of Interior that the Federal Grants and Cooperative Agreements Act of 1978 requires agreements entered into under any part of Public Law 93–638 to be in the form of grants or cooperative agreements rather than in the form of contracts. The changes proposed in the draft regulations, however, go beyond the mere redesignation of "638" contracts and "Johnson O'Malley" contracts as grants. In the analysis of the proposed regulatory changes, a question must be raised as to whether the change from grants to contracts is either required by the Federal Grants and Cooperative Agreements Act or permitted by the Indian Self-Determination and Educational Assistance Act. Analysis of that question is the purpose of this paper.

I. IS THE CHANGE FROM CONTRACTS TO GRANTS REQUIRED BY PUBLIC LAW 95–224 OR PERMITTED BY PUBLIC LAW 93–638?

The basic rationale for the proposed regulatory change is that the change is required by Public Law 95–224, the Federal Grants and Cooperative Agreements Act. A major thesis of this analysis is that this change is not required and is, in fact, prohibited by the terms of the Indian Self-Determination Act.

The Federal Grants and Cooperative Agreements Act is a law of general application, intended to regularize the way in which the federal government enters into agreements with states, local governments and other entities. It is meant to create "uniform statutory guidelines for the sense of Congress on when executive agencies should use grants rather than contracts." 2 1978 U.S. Code Congressional and Administrative News—Legislative History, p. 12. The committee report which accompanied the bill stated: "The requirements contained in the bill are intended to prevent certain abuses, clarify some of the confusions and reorder inconsistent practices that have resulted from this lack of central guidance." *Id.*, p. 12.

The law sets up three basic categories of agreements: contracts for the procurement of goods and services, grants of assistance, and cooperative agreements (grants of assistance where substantial Federal involvement is anticipated). It requires, with certain exceptions, that Federal agreements with states, local governments and "other recipients" conform to one of these three categories, as described in the act. The law contains general language, which absent specific language of the Self-Determination Act and principles of statutory construction applicable in Indian law, would appear to apply to any statute dealing with transfer of funds to another entity for assistance or service programs: "Notwithstanding any other provisions of law, each executive agency authorized by law to enter into contracts, grant, or cooperative agreements, or similar arrangements is authorized and directed to enter into and use types of contracts, grant agreements and cooperative agreements as required by this chapter." 41 U.S.C. Sec. 506(a).

The question is whether this language, occurring in a statute of general applicability, constitutes an implied amendment of the Indian Self-Determination and Education Assistance Act. The legislative history of the two laws and applicable principles of statutory construction suggest that it does not.

The Federal Grants and Cooperative Agreements Act is the product of several years of congressional effort to formulate a law which would address arbitrary choices of contract or grant agreements by executive agencies. Earlier drafts of the legislation were before Congress prior to the enactment of the Indian Self-Determination Act and during the year that the Self-Determination Act was passed. Thus, it is clear that the congressional committees and members of Congress involved in the drafting and passage of the Self-Determination Act were aware of the problems involved in the misuse of contract and grant categories in federal agreements. They were aware of the reports of the congressional and executive committees working on the problem, and of the pending legislation. It was in the context of this congressional concern with the misuse of contract and grant categories that Congress passed the Self-Determination Act. It is significant that this act specifically distinguished between those agreements which should be entered into as contracts and those which should be entered into as grants.

Official comments to the Federal Grants and Cooperative Agreements Act strengthen the conclusion that it was not intended to eliminate the distinction between grantable and contractable activities carefully built into the Self-Determination Act. While recognizing that some existing program authorization statutes would be affected, the official comments state: "The proposed legislation does not automatically change the type of instrument authorized by statute, but rather authorizes the agencies to use other instruments if appropriate and consistent with this bill. The legislation is not intended nor will it eliminate specific program or administrative requirements placed by Congress in individual program statutes. It also will not eliminate specific requirements applying, for example, to grants in such organic statutes as the Work Hours Standards Act. Given the foregoing understanding, it is not practical or necessary to identify all the statutes which might be somewhat affected." *Id.*, p. 20–21.

This statement strongly suggests that a distinction fundamental to the structure of a law, such as the distinction between contractable and grantable activities under the Self-Determination Act are not impliedly repealed by the Federal Grants and Cooperative Agreements Act.

The Indian Self-Determination and Educational Assistance Act was passed to provide a more flexible system for turning over to tribal control programs operated for the benefit of Indians and tribal groups by Federal agencies such as the Bureau of Indian Affairs. It was intended to encourage tribal self-government by establishing a coordinated system for the transfer of operational control of on-reservation programs to the Indian tribes and tribal organizations affected. The programs which are subject matter for the self-determination provisions of the act are those services which federal agencies such as the BIA have a statutory obligation to provide to Indian people. A significant number of these programs are those authorized by the Snyder Act.

The unique aspect of the Self-Determination Act is that it authorizes the transfer of operational control of programs which are a Federal responsibility to tribes and tribal organizations without extinguishing the federal responsibility. That responsibility, based upon statute, trust and treaty, remains an obligation of the federal government regardless of how long the programs are operationally administered by tribes. The act is an example of the unique relationship between the federal government and Indian tribes. It is the uniqueness of that relationship which exempts the Self-Determination Act from the requirements of the Federal Grants and Cooperative Agreements Act.

When Congress passed the Self-Determination Act, the sponsors of the legislation specifically intended to take self-determination agreements out of the restrictive context of Federal law applicable to contracts and other agreements. The official committee report states: "/A/ more flexible authority is needed in order to give substance and credibility to the concept of Indian self determination . . . The rigid procurement and contracting laws and regulations of the Federal Government are either made inapplicable to such contracting or can be waived in the discretion of the Secretary /of Interior/." 4 1974 U.S. Code Congressional and Administrative News—Legislative History, p. 7782. See also 25 U.S.C. Sec. 450(j) of the Act.

The contracts/grants distinction established in the Act was inextricably intertwined with the overall statutory scheme. The comments explain: "Grants are made in order to facilitate contracting by tribes and tribal organizations under the terms of the act." *Id.*, p. 7783.

Grants, under the act, then, are made in aid of the contracting of basic programs which is at the heart of the act. The regulations being proposed by the BIS seek to extinguish this distinction by regulation.

Because the Indian Self-Determination and Educational Assistance Act is a law expressing part of the unique relationship of the federal government and Indian nations, it is protected from implied repeal or amendment by particularly stringent standards of statutory construction. The United States Supreme Court has expressed great reluctance to interpret statutes of general applicability as altering the provisions of statutes dealing specifically with Indians. See, for example, *Morton* vs. *Moncari*, 417 U.S. 535, (1974) 41 L. Ed 2d 290. This is because the high court recognized the unique place of Indian programs and of the Bureau of Indian Affairs in the Federal scheme. As the court has stated: "The legal status of the BIA is *sui generis*." *University of California Board of Regents vs. Bakke*, 438 U.S. 265, 304, 57 L. Ed 2d 780, footnote 42 (1978).

This reluctance to interpret general statutes as applying to Indian tribes is particularly strong where "traditional notions of sovereignty and . . . the federal policy of encouraging tribal independence" are affected. *Merrion*, et. al. vs. *Jicarilla Apache Tribe*, et al., 50 U.S. Law Week 4169, 4175 (1982).

In sum, the history of the enactment of the two laws, their respective purposes, their actual provisions, and the standards of statutory construction applicable to statutes affecting Indian tribes all argue against the BIA position.

RECOMMENDATIONS OF NAVAJO DIVISION OF EDUCATION REGARDING PROPOSED CHANGES IN THE SELF-DETERMINATION ACT REGULATIONS

1. Recognize the special nature of statutes defining the relationship between Indian tribes and the U.S. Government. These statutes must not be subject to amendment through general statutes not dealing directly with Indian affairs. In particular, reject the argument that a general statutes such as the Federal Grants and Cooperative Agreements Act can modify the plain language of the Indian Self-Determination Act and eliminate the use of contracts under that law. This is an issue with ramifications which go far beyond the present question of new regulations.

2. Require the BIA to undertake effective consultation with Indian Tribes and tribal organizations in developing any proposals to change the Self-Determination Act regulations. This should be more than just providing "information meetings" to tribal representatives. It must involve tribal representatives and tribal contractors in the actual development of the proposals.

3. Hold off any change in regulations until the question of realignment is settled so that the regulations will reflect the actual structure of the BIA.

4. Make certain that any rule changes do not result in a loss of availability of property, services or remedies to Indian contractors. As an example, a change in regulations should not result in GSA property becoming unavailable to contract schools.

5. Place all contract and grant requirements within the regulations or appendices to the regulations, rather than referring to OMB circulars. These requirements should not be able to be changed without notice, without being published in the Federal Register and without an opportunity for comment being provided.

6. Make certain that any new regulations address the situation of an Indian tribe with more than one agency within its borders. This is the situation of the Navajo Tribe. It creates contracting problems for the tribe unless it is clear that the tribe, in its contract and grant applications, can apply direcly to an official whose jurisdiction covers the entire reservation.

7. Make some provision for conforming discretionary grant procedures under the Self-Determination Act with the requirements of Public Law 95–561, so that decisions on applications for grants for educational projects will be made by BIA education officials.

8. Review the proposals for new school start and expansion criteria and school construction criteria. These proposals should be related to each other. In addition, they should be guided by the educational planning and policies of the Indian tribe involved and the identified needs of the local community. It is important

to make education funding and construction mechanisms supportive of small community day schools as well as larger schools and boarding facilities

INDIRECT COSTS FOR SELF-DETERMINATION ACT CONTRACTS—THE IMPACT ON SCHOOLS

Members of the select committee, I am pleased to have the opportunity to discuss with you the issue of indirect costs for Self-Determination Act contracts, particularly contracts for the operation of schools. As you realize, the Self-Determination Act, was intended to encourage Indian tribes and tribal organizations to take control of the BIA-operated programs to foster self government for their own people. The act provides that when a tribe or tribal organization undertakes the operation of a program previously provided by the BIA, the contracted program must be funded at "not less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract . . ." 25 U.S.C. Sec. 450j(h). Any savings on this amount is to be spent in providing additional services under the contract, rather than as savings returned to the Department of the Interior.

If this provision of the Self-Determination Act were currently being complied with, the question of indirect costs would not be the critical issue that it is today. The price of a contract would be determined by computing the value of the direct funding which the BIA receives to operate a program and the value of services available to the Secretary of the Interior from all sources in support of the operation of the program. This same amount would then be available to the contracting Indian tribe or tribal organization for operation of the program. As any Self-Determination Act contractor can attest, this is not how contract funds are being computed.

The Bureau of Indian Affairs has long insisted that it can neither determine nor allocate the amount of funds available to the Secretary of the Interior in support of the operation of any BIA program. This claimed impossibility is based upon the supposed cost to the BIA of assisting in contracting and providing non-contracted services and upon the supposed unidentifiability of funds expended in support of a program other than funds specifically earmarked for that program. Neither of these reasons justifies the continued failure of the Department of the Interior to meet the plain requirements of law in regard to funding Self-Determination Act contracts.

As long ago as 1978, the Office of Management and Budget specifically rejected the BIA contention that it could not provide the full amount of funds required by the Self-Determination Act in support of contracts or that it could not reduce its own overhead costs as contracting was encouraged (Letter of James T. McIntyre, Jr. to Honorable Cecil D. Andrus, April 13, 1978). In addition, any manager worthy of the name would have to reject the claim of his subordinates that the costs attributable to a particular product line or company activity could not be determined from the overall company budget. It is inconceivable that a governmental agency should be allowed to rely on what is essentially a claim of incompetence to avoid complying with the requirements of law.

Because the Bureau of Indian Affairs has never identified or funded the full costs of operating a program which goes from BIA operation to contract operation, it has been necessary to develop procedures, formulae and strategies of various sorts for determining the amount of money a contracting tribe or tribal organization will receive to operate a program. Some of these formulae and strategies are very complicated. All are inadequate. And all arise from the fundamental failure of the Department of Interior to do what the Self-Determination Act says about funding contracts. In addition, the Bureau's budget requests to Congress are flawed by the same lack of basic financial information. As a consequence, inadequate sums are appropriated for these "indirect costs" and contractors can suffer a shortfall of these funds.

The Department of Interior has now contracted with the American Indian Law Center to develop alternatives to the present ways of computing and paying for "Indirect Costs" associated with Self-Determination Act contracts. It is difficult to know how to respond to this effort. Certainly it is an improvement to move toward greater certainty and predictability in the provision of funds to meet the indirect costs of contracted programs. If the BIA is allowed to continue to ignore the law in regard to full funding costs of contracted programs, this greater certainty and predictability may be the best tribal contractors can expect from the existing situation. However, any approach to funding the indirect costs (or the direct costs) of a Self-Determination Act contract is fundamentally flawed and inadequate unless it begins with a determination of the amount which "the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract."

Unfortunately, one of the first premises of the report to the BIA of the American Indian Law Center (AILC) is that it will not question the "policy decision" of the Bureau of Indian Affairs to ignore the requirements of 25 U.S.C. Sec. 450j(h) and to determine funding on a "maintenance of effort" basis rather than an equality of funding basis. This premise must be rejected. We urge this committee to insist that as a first step in developing any equitable procedure for funding of indirect costs, the Bureau of Indian Affairs be required to determine the full "Secretarial level" cost of providing program services to Indian tribes and Indian people. This determination should be made through the use of personnel independent of the Department of Interior and in consultation with Indian tribes and organizations, which could assist in identifying funding components. If the Bureau continues to fail to identify these program costs we urge this committee to request a thorough, expedited audit by the General Accounting Office to identify the full value of funds and services available to the Secretary of Interior in support of BIA-operated programs.

While the failure of the AILC report to call for identification of all funds expended in support of a BIA-operated program is a substantial defect in the report, there are many other aspects of the report, both positive and negative, which merit additional comment. We would agree with the developers of the report that the failure of all concerned to employ the term "indirect cost" consistently has created numerous problems. Somewhere along the line "indirect costs" and "overhead costs" have gotten confused. It will be an important step forward to call the various costs involved in operating a program by their true name for contract purposes. We do caution you, however, to be certain that the valuable redefinition of terms does not result in having some category of costs slip through the cracks of contract funding categories.

A contract to operate a BIA-funded school should, if the school is to be funded comparably to a BIA-operated school, involve four categories of costs (in addition to funds for categorical programs such as title IV, title I, et cetera). It should include program costs (funded through the Indian Student Equalization Formula), direct administrative costs (that is, the cost of those direct administrative services available to a BIA-operated school from funding sources other than ISEF), indirect costs (that is costs incurred in support of more than one cost objective, and not readily attributable to a specific objective without undue effort), and contract support costs (that is, the incremental costs to the contractor caused by the requirements of the contracting process, which are not costs for the BIA in a directly-operated program).

In fact, contracts for school operations have not included funds from all of these categories. Instead, schools have received ISEF funding at the same rate they would if they were BIA-operated, and "indirect costs" from the Contract Support Funds line item, which was required to cover everything else. If a stricter definition of "indirect costs" is adopted without addressing the question of adequate direct overhead costs, and if contract support funds are phased out, then contract schools may end up even worse off than they are now. Again, we must stress, new formulations are no substitute for identifying the actual funds and value of services available to the Secretary of the Interior to operate a program such as a BIA school and funding Self-Determination Act contracts at that level.

The Navajo Division of Education has reviewed the recommendations contained in the AILC report with representatives of the various contract schools located in the Navajo Nation. We would like to share with you their reactions and concerns to the report in general, and to the specific recommendations in the report.

In the first place, the school personnel were unanimous in feeling that indirect costs procedures need an overhaul. They were concerned, however, that they were being asked to support implementation of the report when they do not know what form that implementation will take. The report makes many recommendations and identifies various options. It has not yet been accepted by the BIA, nor has the Bureau indicated which options it will follow or according to what timetable. Contract school leaders feel that it will be extremely difficult to put changes in the indirect cost procedures in effect for the 1983 contract year without creating confusion and hardship. They recommend that any implementation plans be developed in conjunction with Indian tribes and tribal organizations involved in contracting and that implementation commerce with the 1984 contract year.

Contract school officials agree that greater certainty in negotiating indirect costs (and all overhead costs) will be beneficial. They all stressed, however, that this predictability must be combined with adequacy of funding, based upon analysis of actual secretarial-level cost of BIA-operation of programs. Certainly, in the interim, these funds should be available at least at the higher of the fiscal year 1981 or 1982 level in fiscal year 1983. In addition, in the interim, the BIA should take steps to adequately identify the "indirect cost" and "contract support" needs it is likely to face in fiscal year 1983. Adequate funds should be sought to avoid a repeat of the shortfall which is apparently occurring this year.

Our smaller contract schools are concerned that any new formulation of indirect costs or of administrative costs generally recognize the need to establish a base cost for small school operations. Since any trend toward day schools in the Navajo Nation will necessarily involve a trend toward small, community schools, it is important now to begin developing financing formulae which create an adequate financial base for operating a small school (we addressed this point in regard to the ISEF formula in our testimony to you in May of this year). In regard to the specific recommendations of the AILC report, we have drafted item-by-item comments after consulting with Navajo contract school officials. These comments are contained in an appendix to this testimony. We hope you will give them serious consideration.

CONCLUSION

In conclusion, we would encourage this committee to develop directives for the Department of Interior and other agencies providing contract funds to Indian tribes and tribal organizations to assure a fair allocation of indirect costs, according to fair and predictable procedures. But we urge you to go further by requiring the Department of Interior to meet its legal obligation to fund Self-Determination Act contracts at their full legal entitlement under 25 U.S.C. Sec. 450j(h). This will involve, of necessity, an unbiased evaluation of contractable programs, either by an independent source secured by the BIA or by the General Accounting Office, to determine the amount and value of services available to the Secretary of Interior in support of contractable programs. We would also encourage Congress to require that the Department of Interior undertake its revision of the "indirect cost" procedures with full involvement and consultation with the Indian tribes and tribal organizations affected. These procedures should be implemented according to timetables which give all parties a reasonable time to understand new procedures, iron out problems, seek appropriate levels of funding and make budget plans.

Attached to this testimony is a summary of the recommendations of the Navajo Division of Education in regard to the funding of Indirect Costs. We hope you will find them valuable in developing Congressional policy on this issue. Thank you.

Appendix A.—Comments of Navajo Division of Education on American Indian Law Center Recommendations on Indirect Costs

AILC recommendation 1: Formally request that the Office of Management and Budget and the Department of Health and Human Services amend A–87 and OASC–10, when they are next revised, to clearly distinguish the difference between "indirect costs" and other accounting or management terms that sometimes have other meanings.

Comment: This recommendation is concurred in. It is important, however, to make sure that the revisions recognize and make provision for costs such as administrative overhead which in the past have incorrectly been labeled "indirect".

AILC recommendation 2: Issue a Bulletin or other release for general distribution that calls attention to the unique meaning of the term "indirect costs" and directing that all official issuances recognize this uniqueness by eliminating the use of other terms when the intended meaning is "indirect costs."

Comment: It will be helpful to issue this bulletin. At the same time, care should be taken in revising existing bulletins and regulations, especially the Self-Determination Act regulations, to provide consistent terminology and to make provision for funding of all the kinds of costs associated with contracting.

AILC recommendation 3: Develop and implement a plan for purging all existing directives and training materials and the annual budget justification materials of terms that are used when the intent is to discuss "indirect costs"; develop a glossary defining terms used in respect to Public Law 93-638 costs.

Comment: This recommendation is concurred in. It is recommended, however, that any glossary be developed in consultation with existing Self-Determination Act contractors to make certain that the terms and definitions conform to the actual situation of the contractors and that the consequences of definitional changes are understood.

AILC recommendation 4: Discontinue the use of contract support funds for tribal indirect costs, as such.

Comment: This recommendation should be implemented. However, it should be done so with adequate lead time and budget development so that the appropriate indirect costs and overhead costs (other than indirect) are adequately provided for from some other line item.

AILC recommendation 5: Develop a statistical method for determining the total BIA cost for a particular contracted program by applying a statistically derive ratio (overhead cost rate) to the program amount.

Comment: Some method for computing cost of contracted programs must be developed. It should be developed, however, with full consultation with Indian tribes and tribal organizations engaged in contracting. It should also be designed to identify all resources "the appropriate Secretary would have otherwise provided for his direct operation of the program. . . ." The phrase "BIA cost" used in this recommendation is a nebulous and inadequate term.

AILC recommendation 6: Use contract support funds to supplement costs to the tribe for operation of a program (depending upon Public Law 93-638 grants for one-time costs) only until such time as the full cost can be incorporated into the overall BIA budget.

Comment: Contract Support Funds should continue to be provided for their original purpose, namely the payment of the incremental costs associated with contracting. This is and will continue to be a separate and distinct need of Self-Determination Act contractors. Use of these funds to pay "indirect costs" or "overhead costs" should be eliminated provided that an alternative mechanism and budget authorization is provided to fund these costs that are now funded out of Contract Support Funds.

AILC recommendation 7: Include funds for both direct and indirect costs in all BIA Public Law 93-638 contracts, and discontinue the use of separate funds for indirect costs.

Comment: The idea of including "indirect costs" in a Self-Determination Act contract is certainly acceptable. In the case of contract schools, however, it will be necessary to assure that these costs are added to the funds which are available to contractors directly under the Indian Student Equalization Formula and are not taken out of ISEF funds. As described above, current ISEF procedures do not include a factor for the additional direct or indirect administrative costs of a contract school. This disadvantage must not be compounded.

AILC recommendation 8: If a separate budget item for contract support is continued, confine the use of the funds to supplementing tribal costs only until such time as they can be incorporated in the regular annual budget process.

Comment: As stated above in regard to recommendation 6, contract support funds should continue to be provided for their original purpose, funding the incremental costs of contracting.

AILC recommendation 9: Amend BIA regulations and issuances to clarify the BIA position in support of OMB Circular A-87 and implementing directives.

Comment: This recommendation is concurred in.

AILC recommendation 10: Assist the tribes in documenting specific cases of failure to fully fund indirect costs and:

A. Use the office of the Secretary of the Interior and inter-agency forums on Indian Affairs to call attention of other Federal agencies to the financial problems of tribes and attempt to negotiate a maximum compliance with indirect cost guidelines.

B. To the extent that high level contracts and negotiations fail to obtain full funding for tribal indirect costs, call on the Office of Management and Budget to assist in resolving differences.

Comment: The BIA should assist all contractors (tribal organizations as well as tribes) in documenting cases of failure to fully fund indirect costs. In addition, the BIA should recognize that in the case of a program directly operated by the BIA, the failure of another federal agency to contribute to shared, indirect costs of necessity results in this cost being picked up by the BIA. Therefore, in the case of a program contracted from the BIA which receives supplemental funding from another federal agency and which receives a shortfall in indirect cost support from this agency, the BIA, under 25 U.S.C. Sec. 450j(h) should be making up this shortfall.

AILC recommendation 11: Amend the fixed rate/carry forward process to apply the adjusted rate only to those programs from which there has been an actual overrecovery.

Comment: This recommendation is concurred in regard to fixed rate/carry forward methods of providing for indirect costs. As will appear below, there are other approaches to this problem which should be considered.

AILC recommendation 12: Document the alternative procedures that can be applied to alleviate inequities and financial deficiencies resulting from the present process and provide criteria for their use; disseminate to both tribal and BIA personnel for application.

Comment: We agree that the alternative procedures to current methods of computing indirect costs should be documented. One concern raised by the present report is that it fails to document or even mention the procedure developed by Lee Sherfel of the Lakewood Office of the Inspector General. This method, which utilizes a "lump sum" method of establishing a fixed administrative base for tribal contractors, was received quite favorably by Navajo contract school officials (although they did want to have some questions about its implementation clarified). It was generally understood by participants in a meeting with AILC personnel in Albuquerque that the Sherfel proposal would be included in the final report. The proposal should be provided to the BIA and to this Committee for consideration in any discussion of better ways of funding indirect costs.

AILC recommendation 13: Provide training and informational material for the tribes that will assure that they are fully aware of all of their direct and indirect cost options, and particularly the disadvantages of the fixed rate with carry-forward process, and the potential advantages of returning to a direct cost approach.

Comment: We agree that training and information should be provided to all Self-Determination Act contractors to assure that they can make informed choices among the direct and indirect cost options available to them. We are not convinced that under the present conditions or the recommendations of the AILC report a "direct cost" approach is necessarily more advantageous. If a "direct cost" method is developed which is well thought out and provides an adequate level of funding, it would very possibly be acceptable to tribal contractors such as contract schools. We question, however, identifying this approach as the more advantageous until it is worked out in detail.

AILC recommendation 14: Handle the contract support funding (contract administration costs) for contract schools in the same manner as other Public Law 93-638 contracts in accordance with earlier recommendations.

Comment: There is no inherent problem with handling contract support funding for contract schools the same as is done with other Self-Determination Act contracts provided the need for supplemental funds to pay for the actual incremental costs of contracting is recognized, and provided another category is developed to provide funds for the cost items now paid for out of contract support funds which are not contract support items. Since contract schools are totally dependent on federal funds, they cannot afford to "absorb" costs which the BIA fails to provide for. There must be a secure guaranteed base for educational program operations and funding for necessary administrative and other overhead costs before the restrictions on the use of contract support funds can be required without impairing the education of Indian children.

AILC recommendation 15: Reevaluate the need for the lump sum guidelines.

Comment: The feeling among Navajo contract school officials is that the lump sum guideines should be rescinded but that the lump sum option should be retained under appropriate guidelines.

AILC recommendation 16: Consider the advisability of contract schools, particularly single program schools, using the direct cost system in lieu of a direct/indirect cost process.

Comment: As stated above, the substitution of a direct cost system for the present mixed direct/indirect cost system is acceptable only if the system is designed to meet the real overhead and administrative costs of contract school operations without requiring schools to raid their program (ISEF) money.

AILC recommendation 17: Implement the initial changes for fiscal year 1983 by making both contract support funds and program funds available as a lump sum to cover both direct and indirect costs.

Comment: This recommendation should be rejected as totally unworkable. As stated in earlier comments, it is completely unreasonable to make changes in the relationship between contract support funds and program funds for the 1983 fiscal year. Contract negotiations are already in progress on these contracts. It is totally unreasonable to expect contractors to play by a new set of rules when the consequences of the changes cannot be determined by either the BIA or the contractor. This recommendation could result in a severe underfunding of administrative costs, indirect costs and contract support costs.

It could cause schools to have to raid program funds to make up their overhead. Any changes of this nature should commence no earlier than the 1984 fiscal year. They should be preceded by a comprehensive process of consultation with Self-Determination Act contractors. They should be based upon data identifying the true cost to the Department of Interior of directly operating the contracted program and upon procedures designed to provide funding at that level to the contractor. Lumping together all funding sources without this data will just result in costs and "savings" which hurt education.

AILC recommendation 18: Develop a detailed implementation plan to assure a systematic, orderly approach to accomplishing necessary changes in the total Contract Support/Indirect Cost process.

Comment: This recommendation is concurred in. It is essential, however, that in developing this implementation plan, the Bureau of Indian Affairs seek the direct, prior involvement of Indian tribes and tribal organizations involved in contracting. A cover letter to the Division of Education (and, we suspect, to other participants in the "consultation" on this report) from Theodore Krenzke leaves the distinct impression that the Bureau is developing an implementation plan without this input and consultation.

AILC recommendation 19: Develop presentation materials and supporting documents for conducting top-level information seminars for the Central Office and each BIA Area.

AILC recommendation 20: Develop training materials for workshops for working level tribal and BIA employees to train them in the revised processes.

Comment: The same comment is applicable to both these recommendations. First the "revised processes" must be carefully developed in consultation with Indian Tribes and tribal organizations. Then training materials must be developed for everyone involved so that everyone has the same understanding of the new procedures. It is not clear why different training materials should be developed for "working level" people and "top level" people. The information should be the same for both. In particular, the information provided to BIA personnel of any level and to tribal personnel and local contractors should be the same.

AILC recommendation 21: Conduct seminars and workshops in Washington, D.C., and in each area prior to full implementation for fiscal year 1984.

Comment: Workshops will undoubtedly be necessary. As stated above, however, an adequate period of developing the procedures that will be the subject of the workshop is also essential. It seems more likely that fiscal year 1985 will be the date for full implementation of these yet-to-be-developed procedures.

RECOMMENDATIONS OF NAVAJO DIVISION OF EDUCATION REGARDING FUNDING INDIRECT COSTS OF SELF-DETERMINATION ACT CONTRACTS

1. Base any new proposals for funding of "indirect costs" or direct administrative costs upon the requirements of 25 U.S.C. Sec. 450j(h), which requires that Self-Determination Act contract funds be provided to contractors at not less than the appropriate Secretary would have otherwise provided for his direct operation of the program.

2. Either require the Department of Interior to obtain the information required to determine the full funding which should be associated with Self-Determination Act contracts, utilizing an independent analyst and involving affected Indian tribes and tribal organizations, OR commission a thorough, expedited GAO audit to obtain this information.

3. Identify and fund a financial base for direct and indirect administrative costs needed to operate small contract schools (fewer than 100 students).

4. Continue the use of contract support funds as they are currently used until a new system of funding indirect costs and direct administrative costs is implemented and in place. After that, continue to use contract support funds for their intended purpose, that is, paying for the incremental costs involved in contracting.

5. Evaluate the different ways of meeting the direct and indirect costs of contracts in a sufficient, predictable manner. This evaluation must be undertaken in consultation with the affected Indian tribes and tribal organizations. It should include consideration of rate, formula and lump sum proposals. The procedure developed by Lee Sherfel from the Office of the Inspector General should be considered in any such evaluation.

6. Develop plans for the introduction of any new funding procedures for indirect costs with such timelines and stages that the necessary budget authorizations can be obtained, procedures perfected and information disseminated. This plan should be developed in cooperation with affected Indian tribes and tribal organizations from its initial stages.

7. Be certain that any rates or formulae which are developed for indirect costs are developed on a program-by-program basis so that they will be valid for each program. This is particularly important to contract schools, which have relatively high administrative and indirect costs.

8. Do not implement any major changes in the indirect cost and contract support funding procedures for the 1983 fiscal year, since contracts for this year are already being negotiated and the budget for this year has been submitted to Congress. Rather, plan to commence implementation no sooner than fiscal year 1984 and fully implement no sooner than fiscal year 1985.

9. For fiscal year 1983, seek funding of the contract support line item at no less than the higher of the fiscal year 1981 or 1982 levels. BIA should begin now to ascertain what its indirect cost funding needs will be for fiscal year 1983 and if necessary, provide supplementary information to Congress. By not projecting future contracting activity, BIA has produced a shortfall of these funds this year and in years past.

STATEMENT OF CLIV DORE, LIEUTENANT GOVERNOR, PASSAMAQUODDY TRIBE, PLEASANT POINT RESERVATION, PERRY, MAINE

Mr. DORE. Senator Cohen, my name is Cliv Dore. I am lieutenant governor for the Passamaquoddy Tribe at Pleasant Point.

It is with great pleasure that I represent my fellow Indian people here today, in the hope that I can share the same concerns and hopes that we all came to express as this meeting.

As the lieutenant governor of the tribe, from the State of Maine, I have followed very keenly the eroding of funds and sovereignty of my people. We are told to contract for those necessities of life, essential for tribal government to operate and its people to exist. However, we are still puzzled over the process.

We are told that a government-to-government relationship exists, that we are unique within this Nation, and we enjoy special powers. Yet at every turn of the page of history, we find the paternalistic attitude of the U.S. Government more evident.

We are virtually fiscal slaves of the Government, unable to break this dependency bondage which has enslaved our people for 300-odd years.

In an effort to appease us, Public Law 93-638 was enacted. Its intentions were honorable, I think, but its execution left a lot to be desired. We are given money, but little if any assistance in the administration of it.

However, we get a lot of assistance when we mismanage it. The current situation of proposed changes to the contract process is a fine example of an attempt to further the paternalistic designs of the U.S. Government, essentially in one department. Where was the tribal input? Why has a fruitful imagination of one man been so powerful, surely not in the interests of serving the Indian population?

If the Federal Government needs assistance in saving money, why is it coming to us? We have very little to save. We know where some of the waste is and it surely is not included in the meager allocation to our tribes.

We, as a tribal government, need a certain amount of funds to run tribal governments. If that amount of funds is not available, we are bankrupt. We are defeated by the very restrictions placed upon us in the so-called contract or grant conditions.

If there are insufficient funds to administer the job, then the job cannot be done. We cannot print our own money, as the Federal Government can. Before indirect is placed in the grant situation, extensive study as to the availability of funds and basic needs of tribal governments has to be addressed. I am sure that the ramifications of such a proposal were not considered.

Indian education is suited to the contracting process, as well as the Indian Health Service delivery system. We are all faced with high unemployment, alcoholism, violence, broken homes, and a very high dropout rate. We as tribal leaders have several reasons for these failures of our people.

Seventy to eighty-five percent unemployment rate on our reservation is common. How does this compare with the Federal Government? Are there 65 percent of your people alcoholics? Ours are.

Does 1 out of 10 people go without, or neglect to receive medical attention because of so-called lack of funds? We do. Do your people experience 80 to 85 percent dropout rate from grammar to high school? Why is it that 75 percent of our families are single-parent families? Will the grant do anything to remedy these situations? I doubt it very much. More than likely it will add to it because they are self-destructive in nature.

Only adequate funding of tribal governments and respect and consideration of our way of life will combat this evil among us. We are few among many. We are a proud part of this country. We are rich in legend and culture. Do not destroy us. Help us.

I would also like to comment on some of the things that were said this morning by the BIA and IHS officials, and enlighten you on a little bit of the indirect process, if you want to call it that, that we have experienced over the past few years.

There was a statement, I believe by Dr. Exendine, that IHS has met the indirect rate request of the tribes by funding them. I guess I have to agree with that in part. But they say, you are going to take the indirect moneys, then which program are you going to cut? Cut contract health care? Are your going to cut out some of your services? Are you going to cut out dental care?

To me that is a self-defeating way of funding anything, especially when the needs is so great.

We had a rate change from 13½ percent to 14.1 percent. Prior to that, we had a 22½-percent rate under indirect. When we went from the $22\frac{1}{2}$ percent to 13.6 percent, we got a bill from the Federal Government.

Senator COHEN. Did you have to read about it in the Congressional Record?

Mr. DORE. No; I did not. This is what we experienced when we went through all the gyrations we have to go through.

Senator COHEN. They did not tell you to wait and read it in the Federal Register, did they?

Mr. DORE. No; they did not. They immediately sent a bill for $59,000 and some-odd dollars.

So the tribe, at that time, I think we had a major layoff and could not fund some of the essential things that were required to fulfill the grant conditions.

Well, it turned around that we got the rate readjusted because of errors that were done in the original 13-percent study and the rate went up to 24.1 percent.

Well, we went back to them and said, well, we got your bill paid, we need to get that indirect rate that was erroneously taken from us in the provisional rate, now that we have a final of 24.1 percent. And they said, well, we cannot do that because it was a different program year.

I said, what's going to happen to the $59,000 that you owe us now, which you had billed us for previously, and that was lost, evidently, it still is.

And then with the advent of the new rate increase, we had—I asked them, OK, now that we have to forget about the $59,000, what are we going to do with the new rate increase, where we need the additional moneys? That is when they told me I had to take it out of my program funds and cut my medical services.

That is just one example. There are many of those that we have had throughout the tribe and it has all resulted in the tribal council going to the bank. We borrowed $150,000 on one occupation. We have gone back, through the land claims moneys, we have appropriated nearly $250,000 of loan moneys. And it is all because of the various grants that are not self-supporting, that are coming from the Federal Government. That covers both grants and contracts.

We have been told by BIA that all those funds are available for indirect, yet, when I negotiated the indirect contract, the contracts with BIA, and gave them a copy of the new indirect rate, they had the same response as IHS, that, well, here is your money, you figure out who you are going to fire. And that is essentially the tenor of the negotiations. I find that very, very degrading to say the least.

The catastrophic funds have been cut from IHS, I have been advised, are not going to be available for 1982.

The GSA problem, I think, is focused on vehicles, but I would like to find out whether that is going to affect the GSA supply of medicines and drugs which are supplied to the Indian Health Services pharmacies and all of the things that the tribal government is eligible for through the Defense Supply Agency and all that. I do not think any of those questions have been answered so far in this hearing.

I might add that our ambulance is a GSA vehicle and without it we would be really lost in that part of the State.

If we do go to, are forced into the grant situation, will that affect our relationships with the Public Health Service facilities throughout the country, and also the Veterans Administration hospitals, and that process of securing drugs and medicines that we need for our tribal members?

I am deadset against a flat rate for all tribes on the indirect proposal. I heard that; I believe Mr. Smith mentioned that. A 5, 10, or 15 percent indirect rate for a small tribe is self-destruction. I think one of the fallacies of the indirect regulations themselves is that they are designed basically for a community that has a tax base because I know ourselves, if we are to keep abreast of any tax, any indirect rate that we are awarded, then we need to borrow nearly 2 years ahead of time because of the audit requirements. By the time that rate, we have gone through the rate and the audit is done, it is nearly 2 years before we know what was spent, and that results in more than likely a payback situation on the part of the tribe. Whereas, I believe a community that has a tax base could increase taxes to cover that and then recover it 2 years later.

We do not have those resources.

Here is a question I would like to ask. I do not think you can answer it now, but, are we treated the same way as the States, as far as, when they are given a contract? Are they in the same situation as we as far as the restrictions and conditions and all those requirements that are placed upon us?

Senator COHEN. Well, that is one of the questions I asked, whether they have—hopefully we will get it for the record—there is a much more restrictive interpretation applied to Indian Tribes than other groups, which would include States. I do not know the answer to that.

Mr. DORE. One final point, I have several, but I do not want to take up the entire afternoon. Technical assistance, as provided by either the Indian Health Services or BIA, I think, should be totally contracted out to the tribes so that we can take that money and go find the people necessary, that know what they are doing. I think that type of assistance would be enhancing the Federal dollars that come to us, because I find in most of the situations that a lot of the officials that we are dealing with really do not have the expertise they should have. They are either shifted so many times or they are always claiming they are so shorthanded and they can not handle requirements or needs on a local level.

Thank you very much, Senator.

Senator COHEN. Thank you very much.

Ladies and gentlemen, I am not sure whether or not we can get a task force put together to file a report about indirect costs by Labor Day, but one recommendation that was made is that we have some follow-up hearings by this committee immediately after Labor Day to see what has been done, and I agree with that recommendation. What is of concern to me is that we have tried; not only the tribes but the Congress wants to break that umbilical cord to some degree between the BIA and the tribes and have self-determination. That was the purpose behind the 1975 act.

We have gone from that through this contracting process and now we are going to a grant process, but it occurred to me during this morning's hearing, as I was listening to the testimony, that if we proceed in the fashion that we currently are, with a good deal of ambiguity and a lack of specificity—that word was coined many years ago—that you are going to end up with many tribes saying, it is not worth self-determination. I would rather, if I am going to be cut back and have the indirect costs taken out and not reimbursed, if I am going to have this program cut back, if we are not going to have the GSA, if we are not going to have medical services, drugs, and so forth provided, then it does not make any sense, it does not make any dollars and cents. And we come full cycle from the BIA to the self-determination to the contracts to the grants and back to BIA again. Because, that is what the option is going to be.

Many tribes will be looking at their own self-interest and saying, it just does not add up for us, and we are better off going back to the old system, which everybody said we wanted to change in the first place.

So we will look at this very carefully and I can assure you that we will try and get some clarity and some further testimony to elucidate the items that were raised today.

With that the committee will stand in recess until 1:00.

AFTERNOON SESSION

Senator DECONCINI [acting chairman]. The hearing will come to order.

We would like to ask all the witnesses if they can come forward now and be seated at the table.

We are going to start with Rosemary Zion. We will also have Enos Francisco, George Jim, Ben Barney, Bruce Hoffman, Roger Bordeaux, Birgil Kills Straight, and Jay Moolenijzer, along with Dorothy Yazzie, and also Dr. Bill Berlin.

We thank you for being here promptly today. This is a continuation of the hearings called to order by Chairman Cohen on indirect cost and contract provisions of the Indian Self-Determination and Education Act, Public Law 93-638.

We will start with Rosemary Zion.

STATEMENT OF ROSEMARY ZION, ASSISTANT DIRECTOR, NAVAJO DIVISION OF EDUCATION, WINDOW ROCK, ARIZ.

Ms. ZION. Thank you, Senator. To preface my remarks, I am here on behalf of the Navajo Tribe's Division of Education. I am standing in for Mr. Lawrence Gishe, the division director, who was called away and was unable to present the testimony. He sends his regrets to the committee.

The Navajo Division of Education has a concern with the proposed changes in the Self-Determination Act regulations and the proposals for indirect costs, not only because of their direct effect on the division and on tribal government, but because we are concerned with the effect on the schools with which we are involved that contract under the Self-Determination Act. Many effects that might be tolerable to a tribe the size of the Navajo Tribe may not be tolerable to a school the size of Black Mesa, for example.

Therefore, in looking at the proposals which the Bureau has developed in regard to the Self-Determination Act regulations and indirect

160

costs, we have been concerned not only with, how would this affect a large tribal government, but how is this going to affect the delivery of education on a community level to those Navajo communities which have taken control of their own school? And I would like to address both these issues in this testimony.

As I said when Senator Cohen was here, I really feel that many of the difficulties I am going to be addressing could be resolved by following the law of the Self-Determination Act, if the Bureau itself would follow that law, particularly that law which deals with the money the contractors are entitled to receive under the Self-Determination Act, and if there were effective ongoing consultations with Indian tribes and tribal contractors about how the regulations should be developed, how indirect costs should be computed, and how the whole act should be carried out. The people engaged in running programs on contracts have a lot of knowledge and they have a lot of valuable information they could be giving to the Bureau if they were consulted in a timely manner, rather than getting information sessions at which you are told, this is what we are going to do. P.S., this is the consultation.

It is too late then. It is at the development stage that consultation could be useful instead of just being the burden that it seems to be to the Bureau. There is something that could be drawn from talking to people who are working out there in the field on the receiving end of these contracts.

In regard to the Self-Determination Act regulations, we have a real concern that the whole underlying theory as to why this change needs to be made, a theory that the Federal Grants and Cooperative Agreements Act requires the change.

One of our recommendations to this committee is that it recognize the special nature of statutes defining the relationship between Indian tribes and the U.S. Government.

These statutes are different from the average statute. They are the successor of treaties between the United States and Indian Tribes, and their special status has been recognized by the Supreme Court and by Congress.

If an act that does not even mention Indians or Indian tribes or the Self-Determination Act, can make changes in the procedures by which that act is implemented, then I think we have a very serious erosion of the Federal Government-Indian government relationship. It means, in a sense, your treaty can be amended and you do not even know it is on the block. And that is what has happened if the theory is bought that this Federal Grants and Cooperative Agreement Act has amended the Self-Determination Act without ever even mentioning it.

And so we feel there is a fundamental flaw in the whole theory that has led to this change. We also question whether in fact, even under the Grants and Cooperative Agreements Act, the change from contract to grant is appropriate.

It is interesting that the Indian Health Service has determined that because it is involved in service delivery contracts; grants are not appropriate. Well, contracts to run schools are also service delivery contracts, and I am somewhat at a loss to understand why contracts are the appropriate mechanism for the Indian Health Service when it is contracting delivery of services, but grants are an appropriate mechanism when you are talking about the delivery of education services. I do not think that makes a lot of sense, frankly.

In our written testimony, we have a more detailed analysis of this whole legal issue of the relationship between those two laws in the context of Indian law, which I would commend to the committee for its perusal.

If there is going to be a change, either because this law requires it or because there are some desirable changes which ought to take place in the Self-Determination Act, we would recommend to this committee that it require of the Bureau effective consultation with Indian tribes and tribal organizations in developing any proposals to change these regulations.

This has to be more, as I said, than just providing an information session after the work has been done. It must involve tribal representatives and contractors in the actual development of the proposals.

We had a situation in February, as a matter of fact, where Dale Heald from the Bureau of Indian Affairs was out in Flagstaff at a meeting at which the division of education also had representatives. We were discussing the changes in the Self-Determination Act regulations. We were told that many of our objections had been taken care of in the new draft. Then we were told we could not get a copy of the new draft, that is would be out in The Federal Register.

How could we possibly respond, "OK, we are satisfied," when we could not see what we were talking about. We eventually got an unofficial copy, Federal Expressed to the division last week, not from the Bureau, but from a friend of a friend who got a copy. That is not consultation as we understand it.

There are some changes in those regulations which I would like to see discussed with the Bureau. You can read them and not be sure what they mean.

Just to give you one example. The existing regulations say that any savings recognized by the contractor shall be applied to the delivery of additional services. The proposed regulations say those savings may be applied to the delivery of additional services. Now what precisely does that mean? Does that mean that the contractor has the choice as to whether or not to do that or that the Bureau may draw back those savings and say, no, you can not use them to provide additional services, we are going to take them back? What is that change from, shall to may?

It is hard to know what your reaction is to that kind of a rule change unless you know what purpose it is serving; what it means. And there are a lot of other small matters that could become big matters within those regulations which need to be explained and discussed before it is possible to take a position on them.

We also feel that any change in regulations should be held off until the question of realinement is settled. The regulations keep talking about the role of the area director. We understand there is not going to be an area director. Where are those responsibilities going to go? Up to the Commissioner? Down to the agency?

It is, again, hard to form a reaction to these regulations when the structure that they perpetuate is one that you are being told is going to disappear. We are very concerned that any rule change not result in a loss of availability of property, services, or remedies to Indian contractors.

And, again, I am not convinced that the Bureau itself knows the ramifications of changing from contract to grant. We heard this morning that there is a problem with GSA vehicles that is being worked on. We did not hear whether or not it can be resolved.

We ourselves have discovered the existence of the Contract Disputes Resolution Act which it appears would not be applicable to resolving grant disputes. What else is out there? We do not know and I am not convinced that the Bureau knows. It is very difficult to accept this change from contract to grant unless you know what, later on down the line, you are going to be told is a consequence of going from one way to the other.

We would like to see all contract and grant requirements placed within the regulations themselves or appendices to those regulations rather than in OMB circulars.

OMB circulars can be changed without any notice being published in the Federal Register, without any opportunity to comment. They are not regulations. They are just policies. And we feel that a significant loss of consultation, and even information is going to occur if the guts of the process of applying for grants or contracts is contained in these circulars rather than the present situation where it is either in the regulations or in the appendices to the regulations, published in the Federal Register, there right in front of you, but requiring notice before they can be changed.

Now, the Navajo Tribe has a particular situation which we do not find addressed in these regulations, and that is the situation of a tribe which has more than one agency within its jurisdiction. Contract schools do not have a problem here. They apply to the agency when they want a contract. To whom does the Navajo Tribe apply? Under the existing regulations they would apply to the area. Under the proposed regulations, that seems to be the sense of what some of the language in part 271 says, but there is other language in part 271, and the other part says that you go to the area only when there is more than one tribe involved.

If we have to apply agency by agency for grants, we will have to apply five times for every one act, and I know that is not what is intended, but it needs to be clarified in there. We would have told them this before it got to this forum, too, if we had been effectively consulted when these regulations were being put together.

From the point of view of education, we would like to see some provision made for conforming the discretionary grants, the 272 part, of the Self-Determination Act through the requirements of Public Law 95-561. Under that law and under BIA policy, the Office of Indian Education Program line of authority is supposed to be deciding on education grants, yet our experience is that that decision is being made by the BIA operations side, because there is no identification of which funds go to the education line and which funds go to the other line.

In fact, we recently had a situation where there was virtually no involvement of BIA education officials in deciding on a grant application of the division of education. So if the regulations are going to be clarified, it is an area where some effective clarification could take place.

There is a whole new section in these regulations on new school starts and on school construction and expansion. Again, there are some valuable things in there, but we would like to have more discussion, more consultation, and be sure we understand what they really mean.

Reading them one way, they could result in pushing BIA students into the public school system whenever there is a public school around. Reading them another way, they could give tribal governments and tribal communities a stronger role in educational planning, which we think would be a very desirable result. But they are going to need refinement before they become law, and we would like to see this process of refinement and consultation undertaken.

In regard to indirect costs, I think one of the biggest concerns we have here is that the Bureau has failed to fully identify its own program delivery costs, or rather the Department of the Interior has, and that is required by section 450(J)(h) of the Indian Self-Determination Act.

Because the actual value of direct delivery of services by the Bureau is not known, it becomes necessary to go to very elaborate formulations to try to get the money out to Indian contractors.

I am not saying this could be made simple, but it could be made simpler if we knew what kind of dollars we were dealing with at the Bureau level, and if that is what we are talking about funding, as the law does.

I have a number of other comments in the indirect cost area that I do not want to over take my time on. Our biggest concern, as I say, there is the whole procedure that has been developed to date that assumes that you can not know how much money the Bureau has to run programs. That is an assumption that is denied by the Self-Determination Act and I think it would be denied by any manager of any business anywhere if any of his line people came to him and said, "We can not tell you what this product costs the company, so we can not tell if we are making a profit." That would not be accepted in business. It should not be accepted in the management of the Bureau of Indian Affairs.

Whatever is done in the area of indirect costs, and we have a number of specific recommendations we have made, I would strongly urge this committee to encourage, force, whatever it takes, the Bureau to do it in a staged, and reasonable, and planned-out manner.

There is talk about implementing changes in the indirect cost procedure before there is any real discussion of what those changes will be. There are a number of recommendations in the American Indian Law Center's report, but they all require further development before you can know exactly what implementation changes that would produce. And yet the cover letter, when we got the report from the Bureau, said, we are in the implementation stage now. How do you feel about it?

Well, implementing what? You can not really tell from the report. And we feel that especially for the 1983 contract year, if there is a rushing into a whole new way of dealing with indirect costs without yet knowing what kind of dollars you are talking about at the Bureau level, without having figured out whether when you take something out of one line item you have another line item to pick up the actual cost of it.

You are going to have chaos and confusion and simply will have replaced one bad situation with another. We very much hope that will not occur.

One final request we have made of the committee is to see that this information on costs be developed independently of just Bureau in-house sources. Mr. Smith did say this morning that they were going to be looking at what program costs were. I would suggest that if this is to be done, it be done either by the General Accounting Office or by an independent analyst.

The Bureau has consistently failed to identify costs outside the Bureau at the Secretary of Interior level as appropriate in the consideration of the cost of its programs.

I think you will end up with a lot of time spent on an unreliable result unless this is done independently and credibly.

Thank you very much.

Senator DECONCINI. Thank you very much.

We want to be sure that everyone has an opportunity to have their statements submitted in the record and the record will remain open for a period of time after the hearing. We have only an hour this afternoon, so let me ask Mr. Francisco if he has any comments or response, or if he would like to add something new to what Ms. Zion has given us?

STATEMENT OF ENOS FRANCISCO, JR., VICE CHAIRMAN, PAPAGO TRIBE OF ARIZONA, SELLS, ARIZ., ACCOMPANIED BY ROSITA RUIZ, TREASURER, PAPAGO TRIBAL COUNCIL; AND BARBARA EMMONS, DIRECTOR, EARLY CHILDHOOD PROGRAM

Mr. FRANCISCO. Thank you, Mr. Chairman.

My name is Enos Francisco, Jr., vice chairman of the Papago Tribal Council of the Papago Tribe of Arizona. Also here with me to testify are Rosita Ruiz, who is the treasurer of the Papago Tribal Council, and Barbara Emmons, who is the director of the early childhood program.

I want to thank you for this time that has been allowed for our tribe to testify here, and I am also glad to see that this committee is still interested in the Indians and their tribal members.

Mr. Chairman, we do have a presentation, and my comments will be based on what is in that testimony.

Senator DECONCINI. Your full presentation will be included in the record of this hearing.

Mr. FRANCISCO. Commenting on what has been said here this morning by the Bureau of Indian Affairs, and the Indian Health Service, and also what has been said by the other tribes, it seems to me that what is causing all the problems are the same problems that have been caused before over the years, and that is the Indian Health Service and the Bureau of Indian Affairs are just refusing to go along with self-determination. They go through with all kinds of acts and maneuvers and they just do not tell us the truth about what is going on and what they are going to do.

We as a tribe, from the Papago Tribe, are determined to take advantage of the Self-Determination Act and Public Law 93-638, but we are afraid that what is going to happen is the Papago Tribe and other tribes are going to begin retroceding and when this starts happening, I wonder what is going to become of us as a whole. I wonder what is going to happen to the BIA and the Indian Health Service when they see these things start happening.

From what the BIA and the Indian Health Service said here this morning, they are saying that everything has been all right, everything is going to continue to be all right, and all we are doing is a few minor changes, yet everything has not been all right. It is still not right and they are going to go through another change and it is still not going to be right.

The same thing goes for their realinement. They did not consult us and they have not consulted us. They have just mentioned it to us and that is all, and as long as the BIA and the Indian Health Service go around doing things like this we are never going to see any self-determination.

Thank you.

Senator DECONCINI. You have Mrs. Ruiz and Mrs. Emmons, who have statements included in the material you have submitted. We will be glad to have them summarize them. I do not have the time for them to read them. All the statements will appear in the record.

Mrs. RUIZ. Good afternoon, Mr. Chairman. My name is Rosita Ruiz. I am the tribal treasurer for the Papago Tribe in Arizona.

As tribal treasurer, I would like to address some of the problems which the tribe has encountered in trying to administer Public Law 93-638. In particular, you were not here this morning, but we listened to the testimony from the Bureau of Indian Affairs and the Indian Health Service to the effect that everything was in compliance and there were no serious problems in terms of past administration of contracts and grants.

In my testimony in the packet that we are submitting for your review, we have included a packet which we prepared in April 1981, at which time the Papago Tribe suffered a very severe cash flow problem, so severe to the effect that the tribe had had to borrow from mining royalties to keep operating the tribal government while we were trying to recoup moneys from the Bureau of Indian Affairs and the Indian Health Service in administering the contracts and grants.

One of the problems that I wanted to point out to you is the fact that the tribal government suffers the consequences of inadequate administration on the part of the Bureau and on the part of the Indian Health Service in administering contracts and grants.

One of the problems that I want to bring out in terms of the Indian Health Service has been the fact that they testified this morning that they include in their appropriations requests for pay raises and cost-of-living increases for employees that are under contract, and that everybody receives this cost-of-living and merit increases along with the Federal employees. That was one of the reasons why we had to dig into our mining royalties, was the fact that the Indian Health

Service would not modify the contract to give us cost-of-living increases which was already programed into the contracts themselves.

It took a trip to Washington, D.C., to address that issue and to turn it around. Giving us the cost-of-living increases would not have taken away any additional moneys from Indian Health Service but they refused to go ahead and award this or make the modifications in our contract.

On the realinement, they talked about making contracts into grants. Too many questions remain about the intent of changing the regulations at this point. Not enough input has been received from tribal people to address the problems that are inherent in changing it from contracts to grants.

One of the things that I want to go into again, and I know this is repetitive but I feel that it is important, it is the only opportunity that we are going to have to address a serious problem about the administering of contracts and grants, and I want to deal with the problem of indirect costs.

Before I can deal with indirect costs, I would have to deal with the direct costs. In the rules and regulations of CFR 25, it is mandated, or it is stated, that the Bureau is supposed to let the tribe contract for moneys that it takes to operate that program, but also the moneys that it takes the Bureau to administer it, and that is separate from the indirect cost that is allowed for the tribe to claim in administering the contracts and grants.

We have never been given any additional amounts of money that would be identified as Bureau's administrative cost money, that they would have used to administer those contracts.

All the contracts and grants that we have negotiated have been based on tentative allocations specifically for that program at the agency level. So I am really concerned about the hidden administrative costs money that is not applied into the contract once the tribe takes over that responsibility of administering the program.

I want to touch very briefly on disallowed costs because that again is, some of the issues that were brought out this morning about the tribe padding their indirect cost rates, and I want to let you know that we are just as concerned, if not more so, about disallowed costs on contracts and grants.

There is no way that we are going to be padding what our indirect cost rate will be because we do the negotiations with the Inspector General's Office during the fiscal year, that would be applied during the following fiscal year, and if the auditors—the auditors scrutinize all the costs that the tribe includes in their pool of indirect costs.

You will notice in our chronologies that we are submitting that the Bureau nitpicks all the line items in our contract budgets that are prepared for each contract and for each grant. An inordinate amount of time is spent on letters and correspondence justifying and rejustifying and submitting documentation to back up every cost, practically, on each contract.

A lot of this could be resolved by more involvement by the contracting officer representative. We have never seen any of the Bureau personnel step into the tribal accounting office to look at the internal controls that the tribe has developed in insuring and safeguarding Federal funds, because in the end, not insuring that we are safeguarding the Federal funds falls on the tribe to repay disallowed costs and we feel that we have developed to that extent, where we are just as concerned.

One of the things, in closing out my statement, I would like to bring out is that I feel that the Bureau of Indian Affairs is reluctant about turning over accounting and budgeting responsibilities to tribes, and I feel that the position that we have taken against changing the regulations at this point in time needs to be seriously considered.

More of the problems that we run into in contracting with the Bureau of Indian Affairs will be presented by Barbara Emmons.

Thank you.

Mrs. EMMONS. Mr. Chairman, thank you for allowing us to speak very briefly and I will keep my remarks brief. We have submitted the written testimony and the chronologies on the contracts, as stated by the tribal treasurer.

We would submit that what is needed at this point in time is not a change of regulations but compliance with existing regulations on the part of the Bureau. We would submit that the problems that we have come from noncompliance with regulations and we have cited some of those regulations.

Our concern, one of our primary concerns is, do we just have contracts eliminated? Do we contract for services, provide these services, and then have the contracts eliminated? I am referring here to the community education contract, which, when Congress told the Bureau they should eliminate element 10 contracts, we have been told it was not Congress' intent that tribal programs such as the Papago Tribe's program would be eliminated but that happened.

We have not been allowed to reprogram moneys from contracts that were eliminated such as the ITAC contract for agricultural services.

We have had difficulty with the Bureau redesigning programs that the tribe has decided, this is the program we want, and within the law this is what is laid out that we can design our own programs, and the Bureau has been redesigning those programs.

The children's home is included here as an example of that.

And finally the early childhood program is included as an example of the frustration in attempting to contract. We included a chronology for that dating back to 1974–75. Community Ed was the very first contract that the Papago tribe had. It no longer exists. Early childhood education will probably not exist after this week because, of the moneys that were supposed to be allocated to the program: we have received only $74,732, and we are ceasing operation without further assistance from the Bureau. We have tried to go through, as we were told at the central office level, you must go through, your area, your agency, we have attempted this, and we are still staring at a blank wall at the end of this week. So we submit that.

We sincerely hope that the members of the committee will review these chronologies, will be aware of the difficulties inherent in contracting and the trap and the pitfalls that are set for tribes in doing so.

I thank you. In the interests of time, I guess the vice chairman will not read the recommendations, but they are included.

Senator DECONCINI. I have had a chance to review your statement and we thank you for the time you have put into it and the recommendations. As I said, the entire statement will be printed in the record and will be available to us. We appreciate the recommendations you are making.

Mr. **Francisco**. That is the end of our testimony, Mr. Chairman. Thank you.

Senator **DeConcini**. Did these recommendations precede the programs that you are talking about?

Mrs. **Emmons**. Yes, sir. The testimony and the recommendations are in the front of the packet and then the chronologies.

Senator **DeConcini**. Did they retrocede the program that you were talking about, back to the BIA?

Mrs. **Emmons**. Which program, sir?

Senator **DeConcini**. The one that you were just discussing?

Mrs. **Emmons**. Early childhood?

Senator **DeConcini**. Yes.

Mrs. **Emmons**. At this point, with no further money to operate a program for fiscal year 1982, and with the cut in the interim funding level that we are supposed to be getting in 1983, I would love to retrocede it and see them run it on what we have tried to run it on. But I am afraid they would wipe it out.

Senator **DeConcini**. What are you going to do? What is the tribe going to do? Are you going to wipe it out?

Mrs. **Emmons**. We do not know. A study committee has been appointed and the tribal council is meeting on this issue next week.

Senator **DeConcini**. Thank you, ladies and gentleman. Your prepared statements will be made part of the record at this point.

[The statements follow. Testimony resumes on p. 235.]

THE PAPAGO TRIBE OF ARIZONA
P.O. Box 837 • Telephone (602) 383-2221
Sells, Arizona 85634

June 30, 1982

The Honorable William Cohen
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D. C. 20510

Dear Chairman Cohen:

My name is Enos J. Francisco, Jr., Vice-Chairman, The Papago Tribal Council, the Papago Tribe of Arizona. Also here with me to testify are Ms. Rosita Ruiz, Treasurer, the Papago Tribal Council, and Ms. Barbara Emmons, Early Childhood Director.

Thank you, Mr. Chairman, for this time that has been allowed to the Papago Tribe of Arizona to present testimony on the Public Law 93-638, The Indian Self-Determination and Education Act of 1974. I am glad to see that the Select Committee on Indian Affairs continues to be concerned about the Indian Tribes and their members.

The Papago Tribe has participated in the spirit and intent of P.L. 93-638 because of our desire for self-determination and because we realize the need to be more responsive to our communities. Like many other tribes, we were not sure what the new law was or what it would mean to us. We anticipated that there would be problems and situations in its implementation, but we were also willing to help solve the problems and ease the situations. We made up our minds to make the law work to our benefit so we began to get involved. To date we have been deeply involved with contracting programs and receiving grants to administer others. Specifics on these programs will be given in our testimony. Our involvement produced many concerns and caused situations that were complex and confusing to us. We realize that this was partially due to some of our misunderstandings. However, we also realize that it was also because we were not being given the fullest of cooperation. The Bureau of Indian Affairs is one entity that has failed in this area of responsibility. Some of these failures also are included in our testimony.

I now want to mention a few specific areas of concern. One area is the changes in regulations. They are given to us at times and in such a manner that they confuse us. Another concern is the subject of indirect cost. The way they are applied does not help the contracts as they should. The third concern is disallowed costs. The consequences of costs that are disallowed are not the same for a tribe as they are for the Bureau under the same circumstances. Finally, there is the administrative problem that the Bureau does not follow regulations in the processing of contracts.

Despite these constant discouragements and lack of concern for implementation of P.L. 93-638, we intend to continue our effort to work with people like you and the Committee who are concerned. With you, we want to discuss and identify problem areas which affect both the Tribal and Federal Government in the implementation process. For the next fiscal year, perhaps our joint efforts will produce mechanisms that will truly bring P.L. 93-638 into reality.

Sincerely yours,

Enos J. Francisco Jr.

Enos J. Francisco, Jr.
Vice-Chairman

EJF/mm

OVERSIGHT HEARINGS ON THE INDIAN SELF-DETERMINATION ACT,
SELECT COMMITTEE ON INDIAN AFFAIRS,
UNITED STATES SENATE,
JUNE 30, 1982

Honorable Chairman and Members of the Committee, my name is Rosita N. Ruiz, Treasurer of the Papago Tribe. As Tribal Treasurer, I would like to address some of the budget problems which the Papago Tribe has experienced in the administration of Public Law 93-638 contracts and grants.

In the packet which we are submitting today, I have included the packet which was prepared on April 29, 1981 which dealt with the issue of late contract/grant awards. I would like to present briefly what the situation was: In fiscal year 1981, the Papago Tribe suffered a severe cash flow problem as a result of carrying Bureau programs. The Tribe had a great deal of difficulty in getting contracts and grants negotiated and awarded by the Bureau and, as a result, was unable to draw any funds to recoup the costs incurred in operating these programs. The Papago Tribal Council took a position and passed a resolution which stated that the Tribe would not carry any Bureau programs unless there was a signed contract/grant award on file in the Tribe's Grants and Contracts Office. For fiscal year 1982, the Papago Tribe, for the first time, was able to negotiate and receive contract/grant awards before the beginning of the fiscal year.

The Papago Tribe has invested a great deal of time and money on staff training in Public Law 93-038 contracting. This has resulted in the Tribe being able to challenge and to force the Bureau to try to meet tribal needs. The success in our efforts to get the Bureau to negotiate contracts and grants on a timely basis for FY-82 is only one example.

When the Bureau talks about changing the rules and regulations of Public Law 93-638, we are talking about costs. We are talking about time and money in terms of retraining staff for the new regulation implementation. We are concerned that the Tribe would have to incur this cost and we are concerned where the Bureau will be getting the funds for the training of Bureau personnel. Is this Bureau cost, again, going to mean less amounts available at the local level? Is the Tribe, again, going to experience delays in contract awards due to changes in format and/or inability of the Phoenix Area Office staff to deal with the changes?

This brings me to the other problem of tribal costs which is incurred for administering contract/grant programs and for which there is little or no recovery.

In order to speak about indirect cost, I must first speak about direct cost. Section 271.54(a) talks about this as follows: "Direct costs under contracts for operations of programs or parts shall not be less than the Bureau would have provided if the Bureau operated the program or part during the contract. Direct costs shall include the Bureau's direct cost for planning, administering, and evaluating the program or part and shall not be used to reduce indirect costs otherwise allowable to the tribal organization."

The Bureau negotiates with the Tribe purely on tentative allocations for the program. The Bureau has never programmed any funds which they budget for the administration of the contracted program. In addition, the Tribe is not informed of the administrative costs which are budgeted either at the Agency or at the Area Office that should be included into the contract budget when awarded to the Tribe. In our negotiations with the Bureau on the Law Enforcement contract, which is a new contract for fiscal year 1983, we were informed that the Phoenix Area Office budget includes monies for vehicle replacements for the Law Enforcement program. The Tribe was informed that they would have to program this cost in the Agency allocation for the Law Enforcement program. Although this problem has been resolved for fiscal year 1983, we are concerned about whether or not this cost will have to be picked up as a program cost out of Agency allocation and not out of the Area Office budget as is currently handled. It has become more and more apparent to us, that not all funds which the Bureau receives for the administration of Bureau programs is turned over to the Tribe once the Tribe contracts. The indirect cost monies are, apparently, suppose to cover these costs. In reality, the funds which are programmed as indirect cost funds are not sufficient. We are again facing cuts in this area. For fiscal year 1981, we were informed that the Papago Tribe would not be paid any indirect cost because the Phoenix Area Office had obligated all the indirect cost monies. This was later changed and we were able to collect on this. For this fiscal year 1982, we were informed that we can collect only 85.2% on indirect cost. We are very concerned that the Bureau is cutting contract dollars and contract support dollars while Bureau employees continue to receive cost of living increases and promotions.

Lastly, I would like to touch briefly on the problem of disallowed costs. You can see by the chronologies which are submitted today, that a great deal of time is spent on "nit-picking" of line items that are budgeted. The Tribe is not given credit for having an accounting system that will check for excessive costs or for costs which might be "disallowed" on audit. To date, there has never been any Bureau personnel that has stepped into the Tribal Accounting Office to monitor the internal control as it relates to any of the Bureau contracts.

Instead, there is an inordinate amount of time spent on telephone calls and written correspondence on contract budgets which could be resolved with a more active involvment by the Bureau's Contracting Officer's Representative. The Tribe is just as, if not more so, concerned about costs which might be disallowed on audit. It is my understanding that BIA Agencies have always had five to eight percent purchases which could be disallowed because of irregularities in small purchases, i.e., two bids instead of three, verbal instead of written bids, or challenge of sole source purchases. When these irregularities are discovered, the responsible person is required to justify his action and if not justified and the cost is extensive, is given a letter of reprimand. When this happens to the Tribe, the Tribe is given a bill of collection. There is no mechanism set up within the Bureau to handle appeals from the Tribe on disallowed costs. With other agencies, the Papago Tribe has been able to substantiate disallowed costs. With the Bureau, there is no such option. This creates a financial burden for the Tribe and the Bureau does not take any responsibility even though the Contracting Officer Representative is suppose to monitor and check for these types of costs during the program year.

It is my feeling that the Bureau is reluctant to turn over the budgeting and accounting responsibilities to the Tribe. This attitude on the part of the Bureau is hampering the "orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." This is further illustrated by the problems which the Tribe has encountered when dealing with the Bureau on the administration of contract programs. This will be presented by Barbara Emmons.

OVERSIGHT HEARINGS ON THE INDIAN SELF-DETERMINATION ACT,
SELECT COMMITTEE ON INDIAN AFFAIRS,
UNITED STATES SENATE,
JUNE 30, 1982

Honorable Chairman and Members of the Committee, my name is Barbara Emmons. As a contract program director for the Papago Tribe of Arizona, I would like to address some of the administrative difficulties the Papago Tribe has had in contracting. C.F.R. 25 § 271.4 states in part that "It is the policy of the Bureau to facilitate the efforts of Indian tribes to plan, conduct, and administer programs, or portions thereof, which the Bureau is authorized to administer for the benefit of Indians...." This policy statement, plus § 271.1(c)(3), "Nothing in these regulations shall be construed as permitting significant reduction in services to Indian people as a result of this Part," would seem to eliminate the possibility of the kinds of adverse actions we have experienced with contract programs.

However, it is not that possibility which is eliminated. It is contract programs which are eliminated with a resulting loss in services. Once contracted, a program should not be eliminated, but the Papago Tribe has had two contracts eliminated. One is the Community Education Program which provided counseling services for Papago students in higher education and in boarding schools. We have been assured that the elimination of Element 10 contracts by Congress was not intended to eliminate programs such as the Papago program, but the Bureau has made no effort to help the Tribe continue to provide these very necessary services. Another example is agricultural services. When I.T.A.C. was zeroed out by Congress, the Tribe attempted to reprogram money which was already allocated in order to continue veterinary and range management services. Tribal people had been trained to deliver these services which are critical to the economy of the Papago. The Bureau not only did not help in this situation, but instead seemed to block every effort we made to resolve the matter. As a result, those skills and the benefits to the people which accrued from them are no longer available.

In addition to the elimination of programs, we have experienced undue influence in the design of programs. The Papago Children's Home is a prime example of this. We believe that once contracted, a program should not be redesigned by the Bureau. If there are to be changes in programs, they should be initiated by the Tribes those programs serve, not by the Bureau. "Maximum Indian participation" implies that the people being served are most knowledgeable about the services they need and desire. Our experiences with the Children's Home contract have led us to conclude that the Bureau neither accepts nor respects that knowledge. Instead of planning with us, they attempt to direct us.

We have addressed the issues of elimination of programs and redesign of programs. Now we should like to address the issue of new programs. Unfortunately, the Bureau's narrow definition of regulations have made it difficult, if not impossible, to initiate programs which serve real and pressing needs of Indian people. Papago Early Childhood was denied a contract at the Agency level even though regulations (§ 271.12) define contractible Bureau programs as "Programs or parts of programs or services that are authorized but not currently operated or provided by the Bureau." Early Childhood was authorized, but the Agency's justification was that it was not operated by the Agency; therefore, it could not be contracted. This attitude continued even after an allocation was made for the Papago program. It was only through the intervention of Central Office that we were able to get our initial contract since Area Office supported the Agency position.

This non-supportive, non-cooperative posture of the Bureau often continues throughout the life of the contract. In fiscal year 1982, the Senate Appropriations Committee directed the Bureau to provide Papago Early Childhood with $272,000 out of Phoenix Area administration to continue the program. To date we have received only $14,732 from Phoenix Area. An additional $60,000 was allotted from monies donated to the BIA for the benefit of Indians. The Area Director proposes to make further deductions from the balance due and contends the Bureau is only obligated to provide an additional $62,558.78. Of the amount he proposes to deduct, $18,062.02 is FY81 carryover. This is clearly in violation of 25 CFR § 271.55, "Savings carried over into a succeeding fiscal year shall be added to the contract amount for that fiscal year. The savings shall not reduce the amount that would have been made available if there had been no savings." Other deductions include the amounts already mentioned plus $3,376.21 contract indirect costs and $37,470.99 Johnson-O'Malley supplemental. He has refused to negotiate. In addition, he has stated that Phoenix Area does not have these funds available and that they will have to come from the Agency. Again, services will be reduced to the Papago people.

Even as we sit here today, one more Papago program, Early Childhood, is facing elimination. We have faced closure six times this year. Now we are facing our seventh and perhaps final closure. We cannot help but ask: is this self-determination? It would appear to us that the intent of Congress has been subverted by the Bureau of Indian Affairs. That intent is clearly stated in § 271.4 "The Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." There is strong fear that self-determination has become a battleground for Federal dollars. The traditional Bureau role as advocates for Indian tribes seems to have changed into an adversary role. This is not a fight we have chosen. From past experience it seems to be a fight in which Tribes can only lose. We appeal to you to review the documentation attached to this report and give your favorable consideration to the recommendations our Vice-Chairman will present.

OVERSIGHT HEARINGS ON THE INDIAN SELF-DETERMINATION ACT,
SELECT COMMITTEE ON INDIAN AFFAIRS,
UNITED STATES SENATE,
JUNE 30, 1982

RECOMMENDATIONS The Papago Tribe of Arizona respectfully submits the following recommendations for your consideration:

1. Prior to contracting, allow the tribes to review Bureau programs in order to determine which of those programs are filling tribal needs.
2. Make available to tribes budget information which clearly shows the total cost of operating those programs as opposed to program allocations.
3. Allow tribes to request reprogramming of Bureau money into programs which fill tribal needs.
4. Make a more equitable evaluation and distribution of indirect costs and prohibit arbitrary Bureau decisions to reduce those costs.
5. Set up an appeal board for reviewing the equity and circumstances surrounding disallowed costs.
6. Allow retroactive contracts and modifications in those cases where the delay of award was caused by failure of the Bureau to meet timetables specified by regulation.
7. Allow automatic extensions of contracts which have been issued in such a tardy manner that there is insufficient time to complete the contract prior to the end of the contract period.

8. Provide more and better informed technical assistance at the Agency level by reducing or eliminating mid-level management.

9. Establish a workable system of budgeting which would allow more meaningful tribal input and prevent Bureau programming or reprogramming which is made at the expense of tribal contract programs.

Finally, most of these recommendations are covered in existing regulations. Therefore, our final recommendation is that any new regulations should not omit them and that the Bureau be compelled to comply with them.

DEMISE OF:
PAPAGO COMMUNITY EDUCATION CONTRACT

1969 - Tribal Education Coordinator position generated by Phoenix Area Office under a Buy Indian Contract using Title I money with Title I writing the job description. Most were under the supervision of the Agency School Superintendent. On Papago the position was supervised by the Tribal Chairman.

Purpose of Buy Indian:

1. Used by the Bureau to circumvent the hiring freeze.
2. Bureau created the positions.
3. They funded the Tribes to hire Bureau people.
4. Coattail effect was to hire people and put them under the Bureau.

1970-71 Audit to investigate that practice also discovered that the Education Coordinator had begun to work with scholarship programs, providing guidance, counseling, etc. This placed contracts in non-compliance with Title I which was for K-12 so Bureau picked up the costs out of higher education grants.

1973 - Change of personnel and of job title. The Education Coordinator became the Education Director. Office was provided in the Sells Agency. Scope of work began to change.

1974-75 - Community Education became the first 638 contract (element 10) awarded to Papago Tribe. Scope of work broadened to include counseling services.

1979 - Program moved into Community Education Building. Construction was funded through E.D.A.

1980 - All administrative positions and functions were removed from the contract and it provided counseling services only with attendent costs for those services. Positions were 2 higher education counselors and one boarding school counselor.

Contract funding levels element 10:

F.Y. 1979 - $140,701
F.Y. 1980 - 59,523
F.Y. 1981 - 52,361
F.Y. 1982 - 57,365 - zeroed out
contract eliminated

This contract provided counseling and referral service to 870 Papago students and parents: 320 Higher Education, 550 Boarding Schools. It was often the only tangible link with home that these students had coming as they did from village all over the reservation where there were no modern communication facilities. That link is broken now and alternative services can not and are not being provided by the Bureau.

Agricultural Extension Services -- FY82
Chronology

1981

June 30	Submission FY82 Agricultural Extension Contract to Agency.
July 10	Letter from Agency asking for rewritten proposal.
July 17	Letter from Tribe to Agency revising Scope of Work.
July 17	Letter from Tribe to Agency revising contract proposal.
Aug. 20	Letter from Tribe to Agency submitting Plan of Work (Agriculture Communications) as requested per August 18, 1981 meeting with Superintendent Vernon Palmer.
Sept. 15	Letter from Area to Tribe stating the contract review was completed. Requesting more clarification on budget.
Sept. 22	Letter from Tribe to Area providing clarification as requested in September 15, 1982 letter; also states that budget/clarification had been previously submitted to C.O.R., Papago Agency.
Sept. 25	Contract documents from Area to Tribe asking for review and Chairman's signature.
Sept. 28	Luke Abrams came to Papago and signed off on contract documents.
*Oct. 23	Letter from Area directing Agency to shut down Agricultural Extension activities by November 20.
Oct. 26	Copy of memorandum received stating budget cuts and that Agricultural Extension Program was eliminated.

---

* Letter not received by the Papago Tribe's Grants & Contracts Office until February 5, 1982.

Jan 8.	Information from Washington that Agricultural Extension was not eliminated!
Jan. 18	Received information from Agency that Papago has $17,100, Indian Action monies, that need to be programmed.
Jan. 20	Telephone call from Jim Battese, Phoenix Area. Mr. Battese stated that October 07, 1981 all Agricultural Extension Programs were cancelled. Agency Superintendent should have notified Tribes. He did not believe we had a signed contract. Stated to go ahead and invoice and he would call next week (when Luke Abrams got back).
Jan. 21	Telephone call from Ben Nevumsa re: Indian Action Team monies, $17,100. Tribe requested to reprogram these funds and decision on this is due in Central Office on January 20, 1982. Area Office received memorandum and sent a copy to the Agency the next day.
Jan. 25	Letter to Agency Superintendent from Tribe notifying BIA that the Tribe requests that the $17,100 Indian Action monies be placed in Agricultural Services.
Jan. 26	Letter from Tribe to Area asking for confirmation of contract number for Agricultural Extension -- no response.
February 05	Letter dated October 23, 1981 from Agency Superintendent to Tribe that Agricultural Extension was eliminated and should shut down program as of November 20, 1981.
Feb. 23	Letter from Agency to Tribe that Tribe should reconsider their choice of Indian Action Team monies into Agricultural and change it to the H.I.P. Program.
Feb. 24	Letter from Max H. Norris, Chairman, Crystal Ann Smith, Grants & Contracts Administration, to Eugene Tashquinth shutting down program as of February 24, 1982.

March 5	Telephone call from Ben Nevumsa re: Indian Action Team monies. Ben stated that, nationwide, too much money had been put into Agricultural and not enough to the H.I.P. Program and that the Papago Tribe's request to reprogram IAT monies to Agriculture would be held up at Central Office. That the Tribe was to disregard teletype of October 7th which stated, Ben stated, that Indian Action Program had been reduced by 75% of which $6,200 was our allocation. Re: Agricultural Extension. Ben stated that this program had not been eliminated. Received second phone call from Ben Nevumsa - he stated to disregard everything he had said about Agricultural Extension, he did not know if we had the contract.
March 12	Letter from Tribe to Area: notification that Tribe will be modifying FY82 Agricultural Extension contract to use ITAC funds of $17,100.00.
March 17	Letter from Tribe to Area: Modification No. 1 - to include $17,100.00 ITAC funds making a contract total of $151,000.00 on Agricultural Extension Services.
March 31	Letter to Curtis Nordwall requesting T/A -- no response.

To this date, we have not received a response to the letter of March 17, 1981 or March 31, 1982.

Invoices have been submitted, held up at the Agency.

CHRONOLOGY FOR THE CHILDREN'S HOME

June 23, 1980	Received Tribal Council approval to recontract under 638 - resolution was passed.
June 24, 1980	Original proposal for Children's Home was submitted to Agency/Area - before June 30 deadline. Amount = $136,766.00. Due to salary adjustments and increases, the contract budget was adjusted to $140,884.40.
July 01, 1980	Notified by Agency that the contract format changed; that all contracts had to be reworked into new format. Agency was supposed to have handled this, but the Grants and Contracts Office reworked the contracts and submitted them.
August 21, 1980	Letter received from Mr. Blackwell, COR, Social Services, Papago Agency that he had received the reworked Children's Home Contract, for his review.
September 05, 1980	Letter received from Supt. asking that budget be cut to $112,000.00 due to the past years low placement of children.
September 26, 1980	Second budget was reworked and resubmitted to Agency in the amount of $116,960.60 (which was rock bottom costs)
October 15, 1980	Copy of letter from Acting Area Social Worker to Area 638 Coordinator was received stating that the proposal had been reviewed and that additional cuts had to be made in the areas of Unit Cost; Staff; and Cost for Facilities; Equipment; Supplies & Services. So that the revised budget would not exceed $108,000 direct costs.
October 24, 1980	Contract documents were received by Tribe for Chairman's signature; also, the responses were needed, (re:10/15/80 letter).
November 19 & December 18, 1980	Memorandums were recieved asking for signed contract documents and responses to be returned to the Area Office.

*NOTE: Due to the amount of information requested, it took time to prepare the responses.

December 29, 1980	Contract documents and responses were signed by Chairman and mailed to Area.

January 21, 1981

The Children's Home Director received a copy of letter from Mr. Blackwell written to the Area with recommendations that there be a cutback in staff, which would mean the closing of one home.

The Children's Home Director also met with Mr. Blackwell on this.

We were given verbal notice that negotiations for the Children's Home Contract would be on Wed., January 28, 1981 at the Area Office.

January 22, 1981

A meeting was held with Mr. Blackwell, Children's Home and Grants and Contracts at which time Mr. Blackwell, again, went over his letter of recommendations on staff cutback for the Children's Home.

January 28

The Papago Tribe, represented by the Administrator of the Grants & Contracts Office, the Children's Home Director, the two key bookkeepers for the Children's Home and the Tribal Treasurer met with the Phoenix Area Office. The Tribe is not negotiating the Children's Home at $86,000.00. The Phoenix Area Office agreed to see what alternatives could be worked out to try to cover the Tribe's proposal for $116,960.90.

February 5, 1981

The Papago Tribal Council reviewed the Children's Home proposal and went over the problems on this contract--the lack of assistance from the Bureau in getting budget information to the Tribe in a timely manner.

February 9, 1981

The Papago Tribe resubmitted the Children's Home contract and the proposed plan to meet the contract sum of $116,960.90.

NOTE: This contracts has since been awarded.

THE PAPAGO TRIBE OF ARIZONA
P.O. Box 837 • Telephone (602) 383-2321
Sells, Arizona 85634

February 9, 1981

Mr. Mitchell Parks
Property and Supply
Bureau of Indian Affairs
P.O. Box 7007
Phoenix, Arizona 85011

Dear Mr. Parks:

Enclosed please find the FY 81 recontract proposal for the Papago Children's Home as well as a copy of Tribal Council Resolution No. 20-81 supporting these documents.

This recontract proposal is in the amount of $86,000.00. The Papago Tribe is entering into this "recontract" with the agreement that this contract be for the amount of $116,960.60 and that it be for fiscal year beginning October 1, 1980 to September 30, 1981.

In order to bring the total amount of this contract to $116,960.60, it is agreed that the FY 80 contracts for the Children's Home and the Rehabilitation Center will be closed out and the savings from these two contracts will supplement this recontract proposal. Once these two contracts for FY 80 are closed out, the Papago Tribe will modify the Children's Home contract of $86,000 and add on these "savings".

We would like to express our dissatisfaction on the manner in which this "recontract" was handled. The Papago Tribe was requested to cut costs from the original proposal of $140,884.40 submitted June 24, 1980. The Bureau requested that the Tribe cut the proposal to $112,000.00 in September. In October, the Acting Area Social Worker recommended that additional cuts be made so that revised budget would not exceed $108,000 direct costs. The Papago Tribe was not notified of this recommendation(s). The contract documents were received by the Tribe in October for the amount of $116,690.60 with requests for additional information/justification. Once these were submitted the Tribe then received a copy of the COR's recommendations which then reflected the Acting Area Social Worker's recommendations. The Tribe was not given a "fund level" at which to prepare the Children's Home contract. Instead, in the letter from the COR to the Area Director, the information given is that "shortage of funds to provide needed services will exist in an approximate amount of $53,000." And, further that "A reduction of three staff at the Home would allow for two live-in houseparents at each home and also the Director and Assistant Director. Depending on positions, the amount of savings would vary from $24,000 up". This information was given to the Tribe four (4) workings day before the date for negotiations on this contract.

At no time was the Tribe given any idea of the funds available for the Papago Children's Home contract. Nor was the Tribe given any alternatives as to where to tap into for additional funds to meet the tribal proposal. It was only at the Tribe's insistance at the negotation table that no negotiations can be held until alternatives can be worked out that the Bureau finally took some steps to assist the Tribe in this matter.

We would like to point out the following steps which should have been taken by the Bureau in providing assistance. This is quoted directly from Contract Guidelines for Self-Determination and Education Assistance Act:

> Exploration of Alternatives when Funds are Inadequate
>
> If the Bureau's SFL (Secretarial Funding Level) or PP-SFL (Partial Program Secretarial Funding Level) funds are inadequate to finance the Tribe's(s') proposal, the Bureau must develop information on available alternatives and provide it to the Tribe(s). These alternatives include but are not limited to the following which may be used separately or in combination to meet the Tribe's proposal:
>
> (1) Provision of additional funds avaiable as a result of savings in other Bureau programs.
>
> (2) Provision of Self-Determination grant funds to cover the initial "start up" costs which may be included in the Tribe's proposal.
>
> (3) Program resdesign or consolidation of operations by either the Bureau or the Tribe(s).
>
> (4) Provision of non-Bureau funds to supplement the Bureau funds available to finance the tribal proposal.
>
> (5) Acceptance by the Tribe(s) of lower service levels either outside of (through reallocation or reprogramming actions) or within the Tribal proposal.
>
> (6) Continued operation of the program by the Bureau either: (a) as presently operated, or (b) as redesigned by the tribe(s).

We would like to insist that the Bureau of Indian Affairs follow the policies and procedures which are "consistent with the provisions of 25 CFR 271.54, Contract Funds, and other applicable portions of the Regulations as they relate to the maintenance of program service levels both within and outside of tribal contract proposals [§ 27.1. (c) (3); (§ 271.12 (a); § 271.15; § 27.34]."

We insist that for those contracts in which the Bureau anticipates problem areas, such as the social services contracts, that they be especially diligent in providing the Tribe with all pertinent information and not wait until the contract is being negotiated.

We would like again to quote from guidelines set forth for handling of contract proposals:

> POLICIES RELATING TO THE MAJOR STEPS IN THE PROCESS
>
> The major steps in the process of determing the amount of Bureau funds available for the direct costs of tribal contracts, as follows:
>
> (a) Describe the Program(s) as operated by the Bureau;
>
> (b) Redescribe the Tribal Proposal;
>
> (c) Describe the Residual Bureau Operations (if any);
>
> (d) Determine the funds available for the Proposal [(a) minus (c)];
>
> (e) Compare the funds available from the Tribal Proposal; and
>
> (f) Explore Alternatives [if (d) is less than (b)].

We are into our fifth year of contracting under the Self-Determination Act and feel that by this time, the Bureau should be well familiar with the processes which are required under this Act. We are concerned that we continue to have proposals submitted, returned, resubmitted, etc. We need and we insist on a good screening process at the Agency level so that we have contracts submitted that meet with Area's expectations.

We sincerely hope that some improvements be made both at the Area and Agency which will help to alleviate the problems which the Tribe is having in contract approvals.

Should you have any questions, please feel free to call Ms. Ann Smith, Grants and Contracts Office, 383-2221, Ext. 211. Your assistance in this matter is appreciated.

Sincerely,

for

Max H. Norris
Chairman

CHRONOLOGY-PAPAGO EARLY CHILDHOOD PROGRAM

1974 - Proposal to contract Early Childhood Program denied, agency level.

Sept. 1975 - Tribe notifies Bureau of intent to contract Basic J.O.M. for Early Childhood Program.

Feb. 1976 - Acknowledgement of intent to contract and promise of technical assistance from Acting Area Director.

July 1976 - Clarification of contract requirements and offer of technical assistance from Area Director.

Sept. 1976 - Approval of application to contract Basic J.O.M. from Asst. Area Director.

1976-77 - Initial funding granted under Basic J.O.M.

June 1977 - Request for assistance directed to Director of Indian Education Programs - no response.

July 1977 - Letter refusing assistance technical or otherwise from Administrator, Indian Education Resources Center, U.S. Dept. of Interior, B.I.A. Office of Indian Education Programs, Albuquerque, New Mexico.

July 1977 - Request for assistance directed to Asst. Area Director - Education, P.A.O. - no response.

1977-78 - 638 J.O.M. Contract supplemented by CETA.

1978-79 - 638 J.O.M. Contract supplemented by CETA and Right to Read.

Jan. 1979 - Acknowledgement of Early Childhood funds appropriated for F.Y. 1979 from Acting Deputy Commissioner. (This referred to interim funding prekindergarten).

Jan. 1979 - Request to contract denied - Agency level.

June 1979 - Senator DeConcini requests information from the Bureau regarding possible funding for Papago Early Childhood. Response: No funds are available from the B.I.A. to support Early Childhood Education Programs such as at the Papago Reservation.

June 1979 - Senator DeConcini requests special appropriation for Papago Early Childhood. Bureau capability statement recommended against the appropriation - "This is an isolated effort. It should be a part of the total comprehensive plan of the Phoenix Area in cooperation with the Tribe."

Oct. 4, 1979 - Senate Appropriations Committee Report - "The Committee understands an early childhood program begun on the Papago Reservation with CETA funding has been both successful and popular. Within available funds, the Bureau should make every effort to support and expand this program."

1979-80 - J.O.M. Contract supplemented by Tribe, CETA. Tribal support based on future I.S.E.P. formula funding.

Nov. 1979 - Tribe learns of the Report language through a chance meeting with Senator DeConcini's aide at National Indian Child Conference in Phoenix.

Jan. 4, 1980 - Tribe receives written confirmation of Report language from Senator DeConcini's office.

Jan. 4, 1980 - Memorandum from Area Director of Education to Agency Superintendent contains proposed budget for Phoenix Area showing Element 10 contracts in the amount of $135,323. Tentative F.Y. 1980 allotments Pre-Kindergarten Programs lists $75,800 for Papago-(Date on budget was 12/20/79) Tribe was not notified of availability of funds for contracting Early Childhood.

Jan. 22, 1980 - Application for Allotment or Change in Allotment, Office of Indian Education Programs, 1/22/80, changes H54 Papago Agency for pre-K program from Element 10 to Element 14. Tribe still not notified of availability of funds or invited to contract.

Feb. 10, 1980 - Education Director goes to Washington to clarify issue.

Feb. 13, 1980 - Request directed to Acting Area Director for assistance in obtaining Early Childhood funds - no response.

Feb. 15, 1980 - Letter from Chairman to Area Director reaffirming intent to contract.

Feb. 19, 1980 - Letter from Agency Superintendent denying the Papago Agency had received an allocation for Early Childhood but stating that he had received word from Phoenix Area Office that same day that $75,800 would be alloted to Papago and suggesting that a contract proposal be prepared for that amount.

Feb. 19, 1980 - Memorandum Area Director to Agency Superintendent indicates $75,800 was available to the Papago Tribe for contracting Early Childhood in F.Y. 1979 but goes on to state the information was incorrect as the amount was not contracted in 1979. (The Tribe was never notified that funds were available for contracting in 1979.)

Feb. 20, 1980 - Letter from Agency Superintendent explaining that the Memorandum from the Acting Deputy Commissioner "F.Y. 1980 Element 10 and 14 Tentative Allotments" was in error when it showed $75,800 available for Papago to contract Early Childhood and that he had only received word the day before that the money would be forthcoming and would be used for the Early Childhood Program.

Mar. 19, 1980 - Certified student count for Papago Early Childhood submitted by Agency Superintendent of Education accompanied by program description and budget material prepared by program director to assist O.I.E.P. in establishing pre-kindergarten weight factors.

Apr. 11, 1980 - Tribal Resolution #29-80 authorizes and requests the Bureau to contract with the Tribe for early childhood education services.

Apr. 28, 1980 - F.Y. 1980 contract proposal submitted for $75,800.

June 19, 1980 - Letter from Acting Area Property and Supply Officer requesting additional data.

July 22, 1980 - Contract awarded for F.Y. 1980, $75,800.

July 22, 1980 - COR designated.

July 23, 1980 - Signed acknowledgement receipt on COR appointment returned to Property and Supply.

Oct. 7, 1980 - Tribal Resolution 97-80 cites P.L. 95-561, 25CFR 31H, and directs the Bureau to insure that it meets the legislative mandates to provide full funding for the Tribe's Early Childhood Program in F.Y. 1982.

Nov. 1980 - Early Childhood certified student count submitted.

Nov. 17, 1980 - F.Y. 1981 Contract awarded, $75,800.

Feb. 12, 1981 - Letter to Director O.I.E.P. stating Tribe's concern that it could not continue to support Early Childhood (Tribal income largely dependent on copper mines) and requesting status of I.S.E.P. formula funding for pre-kindergartens. Resolution #97-80 attached - no response.

Mar. 26, 1981 - Comprehensive plan for including early childhood programs within B.I.A. Education program submitted to Sen. James McClure. Cost per child cited, $2,992.00.

Apr. 20, 1981 - Certified spring student count submitted.

Apr. 17, 1981 - C.O.R., Papago Agency, Technical Evaluation, F.Y. 80, Early Childhood Education Program - "It is my opinion that the Papago Tribe of Arizona, Papago Education, and the Tribal Accounting Department did an outstanding job of administering the contract within its terms and provisions, especially when the late receipt of funds and the short term of the contract are taken into consideration...To the best of my knowledge, this contract was operated within its outlined scope, both substantively and fiscally." (The C.O.R. who signed this evaluation was different from the one the Tribe had acknowledged and there was no notification of change. In addition, the program was never visited or monitored.

May 4, 1981 - Tribe receives Apr. 23 memorandum addressed to Agency Superintendents of Education and Area Education Program Administrators from the Director of O.I.E.P. titled Approval of New Programs and New School Starts for F.Y. 1982 and containing draft interim procedural guidelines for comment.

May 26, 1981 - In a telephone call related to foregoing entry Education Director learns for first time that I.S.E.P. formula funding for pre-kindergartens will not be in place in F.Y. 1982.

May 29, 1981 - Tribe submits comments on Interim Procedural Guidelines for Authorization of New Programs and New School Starts for F.Y. 1982 Indian Education Code 504 - no acknowledgement.

June 15, 1981 - Letter to Director of O.I.E.P. stating Tribe's dismay at failure of Bureau to meet legislative mandate to fund pre-kindergarten in F.Y. 1982, giving history of Papago Earlu Childhood and funding difficulties, and requesting advice and assistance in obtaining adequate interim financing. (Attached were copies of Tribal Resolution #98-80 and the previous letter to him on this matter.)

June 15, 1981 - Letter from Head Start Director stating inability to continue cooperation of Head Start and Early Childhood Programs if per child funding was not equal.

June 17, 1981 - Memorandum from Acting Director O.I.E.P. to Agency Superintendents for Education and Area Education Programs Administrators on F.Y. 1982 tentative allocations for Element 14 (pre-kindergarten) - same level as in F.Y. 1981. Memo also stated, "This may be the final year for this program since it is proposed that in F.Y. 1983 this program be subject to formula distribution."

June 17, 1981 - Memorandum from Acting Director O.I.E.P. to Papago Agency Superintendent of Education referred to phone conversation with Early Childhood Director and stated in part, "Currently, the Papago Tribe operates a prekindergarten program which is not funded directly from the I.S.E.F. Therefore, the Tribe is not currently operating a tribal school, as defined in 25CFR31h. Should the Papago Tribe establish a tribal school which contains those programs funded directly from the I.S.E.F., the tribe could apply for a P.L. 93-638 Contract to operate the tribal school." (This is an erroneous statement since the Early Childhood Program not only meets the definition of a tribal school it is also already contracted.)

June 17, 1981 - Tribal Resolution #68-81 cites the failure of the Bureau to meet the legislative mandates in 95-561 and places top priority on the task of securing adequate operating revenues for Early Childhood by compeling the Bureau to comply, by requesting the assistance of the Arizona Congressional delegation as well as the Interior Secretary, and the Assistant Secretary of Indian Affairs, by considering all possible funding sources with the exception of Papago Agency funds, and by directing agents of the Papago Tribe to accomplish the purposes of the resolution.

July 1981 - Senator DeConcini requests special appropriation for Papago Early Childhood.

July 1981 - Bureau response to proposal amendment for "$272,000 in F.Y. 82 to provide full funding for Papago pre-kindergarten, supplement to $75,800 made available through 638 contract." Capability Statement: "The total $272,000 being requested of the Appropriations Committee for full funding of the Papago pre-kindergarten program is not included in the Bureau's budgetrary (sic) request F.Y. 1982....Full funding for the early childhood program is highly desireable and is fully supported by the B.I.A."

July 8, 1981 - Letter from Morris K. Udall, Chairman of House Committee on Interior and Insular Affairs stating that he had asked the Assistant Secretary of Indian Affairs to look into the matter.

July 21, 1981 - Education Director and Early Childhood Director go to Washington for Senate Appropriations Committee meeting on final report.

July 23, 1981 - Senate Appropriations Committee, Interior Hearing approves Report language: "The Committee directs the Bureau to provide sufficient funds to continue the Papago Early Childhood Program in F.Y. 82 and expects such funds to be made available from the monies allocated to the Phoenix Area Office for administrative purposes.

July 28, 1981 - Letter from Director of O.I.E.P. in response to Tribe's letter of June 15 stated additional regulations could not be implemented until academic and residential standards were in place. He noted that funding level would remain the same and suggested contracting other government and private agencies as possible sources of funding.

Aug. 6, 1981 - $347,800 contract proposal hand carried to Phoenix.

Aug. 12-13, 1981 - Tribal Grants & Contracts Administrator & Program Director get review and approval of proposal.

Aug. 20, 1981 - Letter from Director of O.I.E.P. to Representative Morris K. Udall in response to Rep. Udall's letter of July 22, assures Rep. Udall that the Bureau will provide sufficient funds to the Papago Tribe for the continuation of the Early Childhood Program.

Sept. 10, 1981 - Letter to Acting Area Director clarifies understanding of amount of funding and source and expresses appreciation for review and preparation of contract in amount of $347,800 to be awarded on passage of the Appropriations Bill.

Sept. 20, 1981 - Submitted revised recontracting proposal for $75,800 since Area would only sign a contract in that amount - contract period Oct. 1, 1981 - Dec. 18, 1981.

Sept. 22, 1981 - Letter from Area Director in response to Tribe's letter of Sept. 10 stating Bureau could not enter contract in excess of $75,800 until passage of Bureau's F.Y. 82 budget.

Oct. 1981 - Senator Goldwater supports $272,000 for Papago Early Childhood on the floor of the Senate.

Nov. 20, 1981 - Draft Standards includes provisions for pre-kindergarten.

Nov. 23-27, 1981 - Centers closed due to lack of continuing resolution.

Nov. 1981 - Certified Fall Student Count submitted.

Dec. 15, 1981 - Centers closed. Staff placed on 2 weeks leave without pay.

Dec. 23, 1981 - Interior Bill signed into law.

Jan. 4, 1982 - Staff return to work. Centers reopen.

Jan. 5, 1982 - Letter to Area Director requesting execution of contract for full amount to prevent closure of school on Jan. 15.

Jan. 15, 1982 - Letter from Area Director, in response to Jan. 5 letter stating that Area Office had not received any official information or instructions from Central Office on the matter.

Jan. 21, 1982 - Early Childhood Contract expires.

Jan. 22, 1981 - Title XX Block Grant contract awarded for children under age of 3 in the program.

Jan. 21, 1982 - Letter to Deputy Assistant Secretary for Indian Affairs requesting assistance in resolving issue and stressing the urgency of the matter - no written response.

Jan. 29, 1982 - Resolution of Parent Policy Council stating their concern and requesting the assistance of the Bureau to insure that the program continue operating.

Jan. 25-29 - Education Director goes to Washington to pursue issue. While there he met with Director of O.I.E.P. and staff who stated program should not be funded from education funds since that would be contrary to the Report language. Also met with Asst. Secretary for Indian Affairs and staff who stated Bureau was not obligated to fund Papago Early Childhood. Finally the Asst. Secretary offered to give the program $20,000 from Phoenix Area Office and to take the balance from I.M.P.L. (I.M.P.L. funding would require Council approval since ownership of those funds was being contested.)

Jan. 27, 1982 - J.O.M. contract modified to pay staff salaries and keep the program open one more month.

Feb. 5, 1982 - Tribal Ordinance #1-82 set up emergency interim funding in the amount of $31,377 from District I.I.M. accounts to be available should the Bureau fail to meet the Congressional mandate to provide funding and directed the Tribal Attorney to do all things possible to expedite the mandate.

Feb. 8, 1982 - Letter to Acting Director O.I.E.P. asking status of standards in regards I.S.E.P. formula funding for pre-kindergartens.

Mar. 2, 1982 - Letter from Acting Director O.I.E.P. in response to Tribe's letter of Feb. 8 stating that to date pre-kindergarten had not been deleted from the standards but that pre-kindergarten programs will not be included in I.S.E.P. funding formula until education standards are promulgated (not before 1984). As to standards: "Talks are currently underway at the Assistant Secretary's level which we hope will expedite the publication of the standards."

Mar. 9, 1982 - Memorandum from Tribal Treasurer explaining I.M.P.L. issue and the contested ownership of those funds.

Mar. 10, 1982 - Tribal Resolution #26-82 regarding proposed useage of I.M,P.L. funds to meet Bureau's obligation of funding the program and requesting an immediate accounting of funds in the Agency's I.M.P.L. account as well as directing that the issue of funding Early Childhood be kept separate from the issue of the funds in the I.M.P.L. account.

Mar. 21, 1982 - Tribal Vice-Chairman, Education Director and Early Childhood Director go to Washington again to try to resolve the problem of funding the program.

Mar. 22, 1982 - Tribal Attorney joins delegation in a visit to the Assistant Secretary's office. Assistant Secretary would not meet with total group but did meet with the Tribal Attorney.

Mar. 23, 1982 - Met with Director of I.M.P.D., Head Start in an attempt to find out possibility of expanding Papago Head Start Program to pick up some of the children currently funded by Early Childhood since Head Start was already at its maximum enrollment of 210. Early Childhood was funding 152.

Mar. 24, 1982 - Met with Child Welfare Specialist, B.I.A. Social Services to explore possibilities of funding from that source. She stated it was too late for F.Y. 83 but the possibilities of funding were good if the proposal addresses specific objectives and criteria as outlined in Section 201, Criteria 3. (Earlier in the year we had been told informally at the Agency that there was no money in Social Services for which we could apply.)

Mar. 24, 1982 - Met with Director of Division of Exceptional Education, O.I.E.P. to request help for the Papago Infant Stimulation Program which had been defunded by Indian Health Services. He told us to submit a proposal through the Agency Coordinator of Exceptional Education and he could almost guarantee it would be accepted and funded within a matter of two to three weeks.

Mar. 24, 1982 - Met with Early Childhood Specialist, O.I.E.P. to bring her up-to-date on our efforts and to give her additional materials on Papago Early Childhood. Also met with J.O.M. Specialist to check on status of per student allocation for J.O.M. She stated that the information had gone out of Area Office but we have received no information from that source.

Mar. 25, 1982 - Returned home.

Mar. 26, 1982 - Met with Assistant Secretary in Sells. He committed himself to provide us with $40,000 immediately and to appoint a member of his staff to seek the balance of the funding.

Apr. 22, 1982 - Attended Bureau Policies and Issues workshop in Phoenix conducted by Deputy Assistant Secretary - Policy and Finance. Submitted a formal request for information on status of standards since we had been informed they were at the Assistant Secretary's level - No reply received either verbal or written.

Last week Apr., 1982 - Received allotment of $60,000 from the Assistant Secretary's office. Source-donations to the Bureau for the benefit of Indians. This allowed program to remain in operation until July 2, 1982.

May 26, 1982 - Met with Area Director to follow-up on Assistant Secretary's second commitment. Were told by Area Director that he and the Area Director of Education would pose the question to the Assistant Secretary when they were in Washington the following week. Requested memorandum to that effect. (Two weeks passed with no memorandum received.)

June 11, 1982 - Hand carried letter to Area Director requesting results of his visit to Washington. Were told that the Assistant Secretary had acknowledged the Bureau was obligated to provide the program with $272,000 but denied it was in addition to the contract allocation of $75,800. Instead he indicated that he was only "looking for" $64,057.77 an amount which represented the following deductions from the $272,000: $75,800 contract allocation, $14,732 allotment from Phoenix Area Administration, $18,062.02 F.Y. 1981 carry over, $3,376.21 contract indirect costs, $60,000 allotment from contributions to the Bureau, $35,972 J.O.M. supplemental. He refused to discuss his decision. Requested a memorandum containing the foregoing information - memorandum received showing another reduction reflecting an amount due (according to Area Director) of $62,558.78. No concrete plans for providing money.

June 14, 1982 - Received copy of memorandum to Agency Superintendent of Education regarding May 26 meeting with Area Director.

June 18, 1982 - Tribal Resolution #78-82 demanding balance of funding - to date no response.

Note: All of the foregoing information is supported by documents. It does not begin to represent the total amount of time and effort expended by the Tribe in seeking redress from the Bureau to correct their non-compliance with P. L. 95-561 regulations and their failure to perform their duties as outlined in P. L. 93-638. There have been innumerable phone calls, meetings at the agency level, meetings at the Area level as well as the correspondence and meetings cited here. A brief synopsis of contract activities which reflects the crisis points the program has suffered in F.Y. 1982 follows:

Sept. 28, 1982 - Contract awarded for $75,800 - Period of operation covered Oct. 1, 1981 to Dec. 18, 1981.

Modification #1 - Extension of contract closing time from Dec. 18, 1981 to Jan. 21, 1982 - No added money. Savings effected by staff taking leave without pay for two weeks at Christmas.

Modification #2 - Extension of contract closing time from Jan. 21, 1982 to March 1, 1982 - Made possible by modifying J.O.M. supplemental contract to cover staff salaries for that period. Amount supplemental used for this purpose, $26,774.72.

Modification #3 - Added allotment of $14,732 from Area Administration and extended contract closing date from Mar. 1, 1982 to Mar. 31, 1982.

Modification #4 - Added F.Y. carryover of $18,062.02 and extended contract closing date from Mar. 31, 1982 to Apr. 30, 1982.

Modification #5 - Added allotment of $60,000 from contributions to the Bureau for Indians and extended contract closing date from Apr. 30, 1982 to July 2, 1982.

Modification #6 - Submitted May 17, 1982 to add $19,146, O.I.E.P. 94-142 money for Infant Stimulation project. To date no approval has been received on this modification, however

Modification #6 - Prepared by the Area contracting office to reduce indirect cost has been forwarded for the Tribal Chairman's signature.

1937

THE PAPAGO TRIBE OF ARIZONA
P. O. Box 837 • Telephone (602) 383-2221
Sells, Arizona 85634

April 29, 1981

The Papago Tribe of Arizona respectfully requests your assistance in addressing an area which is causing the Tribe a great deal of concern.

The passage of Public Law 93-638 Indian Self-Determination and Education Assistance Act with it's concept of "tribal authority", "tribal initiative", "tribal direction", and "continued Federal support", has enticed the Papago Tribe into a bureaucratic snare from which there does not seem to be any escape--a snare which is not only sapping the Tribe's financial resources but is also making it impossible to develop a sound working relationship with the Bureau of Indian Affairs, Phoenix Area Office.

The problem which we wish to bring to your attention is that the Bureau has failed to award contracts and grants within the timeframe required by tribal operations. This is due to the unhelpful attitude adopted by the contracting office of the Phoenix Area Office in regards to "638" contracting--an attitude which flies in the face of the Indian Self-Determination Act.

In some cases, it can take as many as six months for the Bureau to process the most straightforward grant or contract. The same is true of recontracts which by their very nature should not require as much time as new contracts. We have attached seven chronologies of our dealings with the Bureau on selected grants and contracts, and we respectfully refer you to them now. Your review of these attachments will show just how long it can take to work a contract or grant through the Bureau.

These delays cause very serious disruptions in the operation of tribal programs and force the Tribe to choose between having no program at all, funding the program out of its own limited resources, or giving up and letting the Bureau provide services directly. You can easily imagine the effects on staff morale and overall program operations when we are forced to announce that, due to Bureau delays, a particular grant or contract will be weeks and even months late. People don't know whether they will get paid. Administrators can't plan program functions or make personnel decisions. Most importantly, the Indian people who are supposed to benefit from the money do not.

Bureau delays also cause large expenses for the Tribe. In those instances when the fiscal year of a "638" project ends and the grant or contract for the next fiscal year is hung up at the Bureau, the Tribe must use its own limited funds to operate the activity on an interim basis, sometimes for as many as six months. When this happens, the Tribe suffers serious cash flow problems. Non-638 tribal functions--like essential governmental meetings--are cut back or eliminated altogether. The Tribe is unable to pay its vendors and the flow of goods and services to the Tribe stops. Sometimes the damage to the Tribe's standing with its vendors is irreparable. Moreover, tribal administrators are required to spend excessive amounts of time dealing with the consequences of all of this.

This situation exists, the Bureau is aware of this.
But no solutions or alternatives have been provided.

It is the Tribe's firm belief that the Phoenix Area Office deliberately causes these delays and that major changes in policy and attitude are necessary in order to realize the intent of the Indian Self-Determination Act. The Phoenix Area Office believes that "638" contracting is just another form of procurement. That is, it believes that the Bureau is buying something from the tribe rather than transferring authority and responsibility from one government to another. The Area Contracting staff has failed to absorb the philosophy embodied in the "638" regulations: that there is a presumption in favor of awarding contracts, that changes in program operations from year to year are to be encouraged, that the burdens of the contracting process are to be minimized. Instead, the contracting office nit-picks contracts to death and fights any innovative approaches a tribe proposes. The office shows a mentality it developed from protecting the government's financial interests on procurement contracts over the years--a mentality totally inappropriate for processing "638" contracts.

We feel there are no easy answers to these problems. They are entrenched in the Bureau structure. Drastic measures will be required to make any progress and we therefore urge you to consider with us alternative arrangements--such as placing most of the contracting and granting functions at the Agency level--in the coming months. But your assistance in this way will not help us with the immediate problem of getting our present grants and contracts fulfilled. Therefore, we also ask you to use your good offices to accelerate Bureau processing of the following grants and contracts:

Contract: The Papago Farms

Grants: Personnel, Employee Training
O'Odham Communications
Tribal Garage

Thank you for your continuing interest in our problems. Your efforts to help are appreciated by the Papago people.

Sincerely yours,

Enos J. Francisco Jr.
Vice - Chairman

for Max H. Norris, Chairman
The Papago Tribe of Arizona

Attachments

1937

THE PAPAGO TRIBE OF ARIZONA
P.O. Box 837 • Telephone (602) 383-2221
Sells, Arizona 85634

CHRONOLOGIES

For the following

GRANTS AND CONTRACTS

Under

Public Law 93-638
Indian Self-Determination and Education
Assistance Act

GRANTS: Tribal Employee Training
Tribal Garage
O'Odham Communications
Adult Court

CONTRACTS: Children's Home
Agriculutural Extension
Papago Farms

Prepared by the staff in the Papago Tribe's Grants & Contracts Office
April 30, 1981

Chronology for the
TRIBAL EMPLOYEE TRAINING
FY-81 Grant Proposal

June 24, 1980 - The Papago Tribal Council reviewed all the grant proposals sumbitted for funding under the FY-80 and FY-81 P.L. 93-638 Grant funds. The Papago Tribal Council approved all the proposals submitted which includes the Tribal Employee Training proposal for $23,758.00.

June 30, 1980 - The Papago Tribe submitted the FY-80 and FY-81 Grant proposals to the Papago Agency.

July 7, 1980 - The Phoenix Area Office sent a memorandum to the Papago Agency (BIA) changing the format for preparation of grant proposals. The grant proposals were returned to the Tribe for rewriting into the new format.

NOTE: The rewriting of the Tribe's proposals was the responsiblity of the Agency.

August 7, 1980 - The Papago Tribe resubmitted all the FY-80 and FY-81 Grant proposals in the revised format with a tribal request for technical assistance "immediately" if the grant proposals did not meet the Area Office's requirements.

September 18, 1980 - The Phoenix Area Office sent a letter to the Tribe stating that "*we have completed our review of your FY-81 Self-Determination grant application. The following constitute our findings by project title.*"

B. Training Program

The Approach section of this program Does not relate directly to the Needs and Objective section.

It is true that the Training Office will work with certain agencies, but in what manner will the work be done? Who will do the work? What will be the end result? How many training sessions can be expected for FY-81?

The Budget relates to two (2) employees while those employees do not relate to the grant narrative. In certain instances the job descriptions presented are better grant narratives than the program itself. This needs work.

Fringe benefits are not addressed in the Budget justification. What percentage of fringe is being utilized, and what comprises that percentage?

Again we ask the Tribe how long we are expected to fund this program? See our remarks regarding this issue in program A. They are pertinent to this program as well."

NOTE: The remarks for program A states: *"It is not the intent of P.L. 93-638 to provide funding on an on-going basis. At some point the Tribe must assume responsibility for the program. If funded this year, the Bureau will have supported the program for over two (2) years. The maximum length of funding we will consider is three (3) years."*

NOTE: The Papago Tribe is aware of the three year funding limitation. This was addressed in the Tribe's response to the Phoenix Area Office as it related to the Papago Planning and Research Department, September 22, 1980. (Copy of this letter is attached.)

December 9, 1981 - The Phoenix Area Office sent a letter to the Tribe stating that the FY-81 Self-Determination Grant funds had been reduced from $274,800.00 to $255,900.00 as a result of budget cuts and that *"In order to avoid the problems experienced at the end of FY-1980, we ask that the Papago Tribe of Arizona submit its final grant program by May 30, 1981."*

NOTE: All the grant budgets which could be reduced were reworked to reflect the budget cut.

December 15, 1980 - The Tribe received a notice of receipt from the Phoenix Area Office on the Tribal Employee Training application. The Area Office has 30 days to review.

February 2, 1981 - The Training Coordinator for the Papago Tribe submitted a listing of on-site training sessions scheduled for fiscal year 1981 to the Phoenix Area Office.

February 6, 1981 - The Phoenix Area Office sent a letter to the Tribe notifying the Tribe that they had completed their review of the Tribal Employee Training proposal and stated the following:

"Please provide us a list of the sixteen (16) on-site training sessions and expected attendance by position. In addition include approximate costs and

where the funds are coming from to do this training. It is noted that tuition costs are not part of this proposal and the Tribe has not addressed this in the tribal budget.

Also, the Standard Form 424 does not indicate the length of this grant or its beginning date. Please provide this information. If start up is prior to award, incurrence of costs will have to be documented.

Further, we are not pleased to be paying for aposition again this year. The Self-Determination Grant was not meant to subsidize tribal employment. Costs of this nature may be appropriate to the indirect cost proposal to be submitted to the Office of the Inspector General for FY 1982.

You are formally notified that we will not consider funding this position in FY 1982."

NOTE: The Papago Tribe is aware of the "subsidizing" of "tribal employment". The Tribe is attempting to address the area of personnel management which is one of the systems which the Tribe must have as a "condition" to receiving federal, IHS and BIA, funds. An assessment has to be made of the training needs as well as the need for technical assistance. This would help the Tribe cut down on costs for training and technical assistance by either tapping into available T/TA sources or bringing the training "on-site."

February 13, 1981 - The Papago Tribe sent a letter to the Phoenix Area Office responding to the request for the schedule of on-site training sessions and a breakdown of the cost incurred under the Tribal Employee Training.

February 18, 1981 - The Phoenix Area Office sent a letter to the Papago Tribe notifying the Tribe that the *"Self-Determination grant application in the area of Tribal Employee Training is hereby approved.*

The Contracting Officer will be getting in touch with you shortly to negotiate the grant agreement. You will be provided all documents to be used in the negotiations.

Approval of this application is based on tentative funding levels for FY-81. The amount may vary when FY-81 final allocations are received later in the fiscal year. If funds in this program area are reduced, the grant will have to be reduced.

We wish you every success with the program."

March 6, 1981 - The Phoenix Area Office sent a letter to the Tribe enclosing the Grant Agreement for the Tribal Employee Training and requesting the Tribe to review this agreement and sign off on the documents.

"We are requesting that you submit additional justification and support for budget line items Office Equipment and Travel. Travel needs to be broken down into cost determination categories such as Per Diem, Airfare, etc."

April 8, 1981 - The Papago Tribe submitted the signed documents for the Tribal Employee Training program together with:

"1) A revised budget and budget justification including additional justification for the Travel line item. Please note that the Office Equipment line item has been eliminated.

2) A listing of expenditures incurred from October 1, 1980 through February 1981."

April 9, 1981 - The Phoenix Area Office sent a letter to the Tribe stating *"your amended grant documents for Tribal Employee Training under P.L. 93-638 for FY-81 was received in this office April 8, 1981.*

We will get back to you shortly regarding our final determination."

April 17, 1981 - The Phoenix Area Office sent a letter to the Tribe stating the following:

"The Tribe's P.L. 93-638 grant package for Tribal Employee Training and the requested additional justification for Office equipment and Travel was received on April 16, 1981. Mileage under Travel was found to be inadequately supported. Listed below are questions we feel should be addressed and submitted before further processing can continue:

1. How did the Tribe arrive at the $712.00 allocated for mileage?

2. What is the Tribe's mileage rate?

3. Who will be paid mileage and why?

4. The daily mileage to be traveled.

5. The number of sessions or meetings scheduled.

When the above is submitted, the grant can be processed further for award."

April 30, 1981 - The Papago Tribe has not been able to respond to this latest request for "further" details.

NOTE: The Grants and Contracts Office of the Papago Tribe currently has only one staff member who works with all contract/grant matters--not only the BIA contracts/grants but also all other federal, state, etc. contracts and grants.

CHRONOLOGY for the TRIBAL GARAGE Grant Proposal

P.L. 93-638 FY-81

June 24, 1980 - The Papago Tribal Council reviewed all the grant proposals submitted for funding under the FY-80 and FY-81 Public Law 93-638 Grant funds. The Tribal Council approved all the proposals submitted which includes the Tribal Garage proposal for $26,500.00.

June 30, 1980 - The Papago Tribe submitted the FY-80 and FY-81 grant proposals to the Papago Agency.

July 07, 1980 - The Phoenix Area Office sent a memorandum to the Agency changing the format for preparing grant proposals. The grant proposals were returned to the Tribe for rewriting into the new format. The rewriting of the Tribe's proposals was the responsibility of the Agency.

August 07, 1980 - The Papago Tribe resubmitted all the FY-80 and FY-81 grant proposals in the revised format with a tribal request for technical assistance "immediately" if the grant proposals did not meet the Area Office's requirements.

September 18, 1980 - The Phoenix Area Office sent a letter to the Tribe stating that "*we gave completed our review of your FY-81 Self-Determination grant application. The following constitute our findings by project title.*

F. Tribal Garage

This program is written as two separate grants with a budget. This will have to be rewritten as one program.

No budget justification is noted. Please tell us how costs were compiled.

December 09, 1980 - The Phoenix Area Office sent a letter stating that the FY-81 Self-Determination Grant funds has been reduced from $266,124 to $255,900 as a result of budget cuts. NOTE: All grant budgets that could be reduced were reworked to reflect these budget cuts.

December 09, 1980 - The Papago Tribe resubmitted the revised Tribal Garage grant proposal.

January 29, 1980 - The Phoenix Area Office sent a letter to the Tribe stating that their office had received the Tribal Garage grant proposal and that "*we now have 30 days in which to review the application, notify you of any additional information which may be needed, and advise you of our recommendation.*"

February 11, 1981 - The Phoenix Area Office sent a letter to the Tribe stating that "*your Self-Determination grant application in the area of Adult Court is hereby approved. The Contracting Officer will be getting in touch with you shortly to negotiate the grant agreement. You will be provided all documents to be used in the negotiations. Approval of this application is based on tentative funding levels for FY-81. The amount may vary when FY-81 final allocations are received later in the fiscal year. If funds in this program area are reduced, the grant will have to be reduced.*"

March 04, 1981 - The Papago Tribe received the proposed grant packet for the Tribal Garage from the Phoenix Area Office which requested that the Tribe review and, if in agreement, sign and return the packet. The Tribe was also requested to complete all of Part II, Project Approval Information, Sections A & B, and further: "*We are also requesting additional justification for the Exhaust Performance Analyzer, plus tribal account numbers for each line item. Remember, the procurement in the proposed Construction Improvements to the Tribal Garage will require compliance to the conditions as outlined under Appendix A of the General Conditions.*"

NOTE: The Papago Tribe is unable to get any clear response as to what the purpose is for filling out the "Project Approval Information, Sections A & B," and why this is necessary.

March 19, 1981 - The Papago Tribe sent a letter to the Phoenix Area Office along with the signed grant documents for the Tribal Garage. This letter included the additional justification requested plus the following: "*We did not answer Part II, Project Approval Information, Sections A & B because this land is in the process of being turned over to the Tribe. The Tribe will have a supporting Council Resolution before actual construction begins.*"

March 31, 1981 - Telephone call from the Phoenix Area Office to the Tribal Grants and Contracts Office. The Area Office stated that "*the information submitted was inadequate and that the Project Approval Information sheet would have to be filled out.*"

The Grants and Contracts Office maintained that the Tribe did not have to fill out the forms because the land is being turned over to the Tribe and actual construction will not begin without a Tribal Council Resolution. The Grants and Contracts Officer was asked, "*Are you saying that you refuse to complete the Project Approval Information sheet?* " The answer was "*Yes.*" The Area Office then stated "*then you will not receive a grant award!*"

April 07, 1981 - Telephone call from the Phoenix Area Office to the Tribal Grants and Contracts Office. The Area Office asked why the information had not been received as requested. The Grants and Contracts Office stated "*we still do not see that it is relevant to the grant to have the form submitted. As far as the additional justification on the exhaust performance analyzer, it is a necessary piece of equipment and has already been justified as to how it will be used, etc. The Grants and Contracts Office was then asked to break down how many vehicles the Tribe owns; leases; how many trips to Tucson, etc., etc.*

At this point, the Area Office stated that "*the grant date should be moved from October 1, 1980 to a more suitable date; and that it would still be a one year* *grant. That the Tribe would not have sufficient time to complete construction before the grant period was up, 9/30/81.*

The Tribe still maintained that they wanted the grant date to remain the same - October 1, 1980 through September 30, 1981.

April 17, 1981 - Another conversation with the Phoenix Area Office in regard to Tribal Garage grant. Again, the Area Office stated "*that justification breakdown is needed on the exhaust performance analyzer and that the grant award date should be changed from October 1, 1980 to a more current date.*"

The Tribe maintained that we wanted the date of grant to remain the same and, if need be, we would request an extension.

April 24, 1981 - The Phoenix Area Office sent a letter stating the following: "*This is to document the discussion in this office between Gerald Knox and your Contracting and Grants Officer, Ms. Ann Smith on April 17, 1981, regarding your Tribal Garage grant and the requested budget justification. The submitted additional information was found to be inadequate. We still need the following:*

1. *Justification for the purchase of the Exhaust Performance Analyzer. We realize the saving in mileage and time, but the number of vehicles to be serviced needs to be addressed. How many of the vehicles are leased and who is responsible for the test with leased vehicles? Will personal vehicles be tested also? If so, will there be a charge? Historically, with what frequency have your vehicles required retesting?*
2. *Attached is Part II - Project Approval Information, Section A and B. This form is a part of the grant*

> *application and must be completed before further processing can take place.*

> *"The effective date of October 1, 1980 should be changed to a more current date. If the Tribe has incurred costs from that date or any date prior to award, confirmation must be made by the Papago Agency Superintendent. The above material was requested by telephone on March 31, 1981 and April 07, 1981, with no response. Should the Tribe require assistance, please feel free to contact this office. Submit the above as soon as possible."*

To date, this information has not been submitted and we still do not have our Tribal Garage Grant Award.

NOTE: Copies of all correspondence for the Tribal Garage Grant Proposal is on file in the Papago Tribe's Grants & Contracts Office. No duplications were made for inclusion in this chronology due to the volume of documents.

CHRONOLOGY FOR THE
O'ODHAM COMMUNICATIONS
Grant Proposal

June 24, 1980 - The Papago Tribal Council reviewed all the grant proposals submitted for funding under the FY-80 and FY-81 Public Law 93-638 Grant funds. The Tribal Council approved "O'Odham Communications" proposal for $25,418.00.

June 30, 1980 - The Papago Tribe submitted the FY-80 and FY-81 Grant proposals to the Papago Agency.

July 7, 1980 - The Phoenix Area Office sent a memorandum to the Papago Agency, BIA, stating that the grant application format had been changed and that all the proposals had to be rewritten. The proposals were returned to the Tribe for rewritting into the new format.

NOTE: The responsibility for rewriting the grant proposals into the new format was the responsibility of the Agency.

August 7, 1980 - The Papago Tribe resubmitted all the FY-80 and FY-81 grant proposals in the revised format with a tribal request for technical assistance "immediately" if the grant proposals did not meet with the Area Office's requirements.

September 18, 1980 - Received a letter from the Phoenix Area Office stating that "*We have completed our review of your FY-81 Self-Determination grant application. The following constitutes our findings by project title.*

E. O'odham Communications Inc.:

This program has no substance at all. There appears to be no objective other than to hire staff. The Approach section should at least address what these people do.

In addition, there is no Budget Justification included. This will need to be written and submitted.

As is written it appears that this program is a private enterprise; reference Inc., in title. We are not authorized to subsidize private enterprises with Federal monies.

As written, we would not fund this program for FY-81."

December 9, 1980 - The Phoenix Area Office sent a letter to the Tribe notifying the Tribe that the allocation for the Self-Determination Grant had been cut from $266,124.00 to $255,900.00.

NOTE: The grant budgets which could be reduced were reworked to reflect the budget cut.

February 16, 1981 - The Papago Tribe resubmitted all the revised grant proposals including the O'odham Communications.

February 26, 1981 - The Papago Tribe received a letter from the Phoenix Area Office stating that they received the applications which included the O'Odham Communications proposal. *"We now have 30 days in which to review the application, notify you of any additional information which may be needed, and advise you of our recommendation."*

March 13, 1981 - The Papago Tribe received a letter from the Phoenix Area Office which stated the following:

"We have reviewed your application for a grant in the area of O'odham Communications Inc., P. L. 93-638, FY-81.

At this time we are disapproving the application because it does not meet the requirements of 25 CFR 272.5(c), Statement of Policy. This section of the Code states:

> *'Under this grant authority the Bureau of Indian Affairs will administer a program of Indian Self-Determination grants which shall be subject to Parts 272 and 276 of this chapter. In administration of this grant program, it shall be the Bureau's policy that approval of applications for these grants shall include a determination that there is a direct and reasonable relationship between the applicants' and proposed and the provisions of section 104a of the Act of 272.12. (Emphasis added by underline.)'*

In reviewing your application against 25 CFR 272.12(a)-(e), Purposes of grants, we cannot determine that '...a direct and reasonable relationship...' exists between the application and the Act or regulations pertaining thereto. We have enclosed a copy of 272.12 taken from 25 CFR as of April 1, 1980 for your review.

In reviewing that section of the regulations, we had hoped to use 272.12(a) (2), 'Improvement of tribally funded programs or activies.' However, a review of the proposed 1980-81 tribal budget reveals that the Papago Tribe is not funding this program.

Further, the Papago Tribe, through Ordinance No. 5 attached to the application, has chartered the O'odham Communications Inc., as a private organi-

zation. As an organization, which exists as an inappropriate for us to provide support with Federal funds. As a private organization, O'Odham Communications Inc., is not related to the tribal government for which these funds are specifically intended.

If you have questions regarding this decision please do not hesitate to contact us. Technical assistance is available from the Papago Agency in writing a grant proposal which meets regulatory requirements and the intent of the Act itself."

NOTE: The Agency should have caught this problem area when the Tribe first submitted this proposal and offer "appropriate technical assistance as may be required to overcome any problems or deficiencies in the application."

March 19, 1981 – The Papago Tribe wrote a letter to the Phoenix Area Office stating the following:

"This is in reply to your letter of March 11, 1981 wherein you disapproved the above application.

Although the Tribe does not monetarily support the O'Odham Communications Inc., it does support it with in-kind contributions such as: office space and equipment video equipment; phone service, maintenance and trash collection. This support, in our opinion, would quality as being a Tribally funded activity.

Further, O'Odham Communications is chartered under the Tribe and not under the State and is therefore regulated by the Tribal Government and its laws.

O'Odham Communications Inc., also receives funding the National Telecommunications and Information Administration for development of a radio station. CFR Sec. 272.33a states that:

- 'grant funds...may be used as matching shares for any other Federally or non-Federal grant programs which contribute to the purposes specified in 272.12.'

Hopefully, this clarification will enable you to reconsider the enclosed proposal."

April 17, 1981 – The Papago Tribe received word from the Phoenix Area Office, Contracting Officer, that the O'Odham Communications, Inc. grant proposal had been submitted to the Solicitor's Office for a legal opinion.

April 30, 1981 – The Papago Tribe has not received the grant award for O'Odham Communications not any information regarding this grant proposal.

NOTE: This has been referred to the Tribal Attorney for follow up. Based on past experience with the Bureau's Solicitor's Office, this "opinion" could take months to years.

CHRONOLOGY for the
ADULT COURT Grant Proposal
P.L. 93-638 FY-81

June 24, 1980 - The Papago Tribal Council reviewed all the grant proposals submitted for funding under the FY-80 and FY-81 Public Law 93-638 Grant funds. The Tribal Council approved all the proposals submitted which includes the Adult Court proposal for $59,751.00.

June 30, 1980 - The Papago Tribe submitted the FY-80 and FY-81 grant proposals to the Papago Agency.

July 07, 1980 - The Phoenix Area Office sent a memorandum to the Agency changing the format for preparing grant proposals. The grant proposals were returned to the Tribe for rewriting into the new format. The rewriting of the Tribe's proposals was the responsibility of the Agency.

August 07, 1980 - The Papago Tribe resubmitted all the FY-80 and FY-81 grant proposals in the revised format with a tribal request for technical assistance "immediately" if the grant proposals did not meet the Area Office's requirements.

September 18, 1980 - The Phoenix Area Office sent a letter to the Tribe stating that "*we have completed our review of your FY-81 Self-Determination grant application. The following constitue our findings by project title.*

D. Adult Court:

This program is written in two parts and it doesn't make sense in that format. It will have to be rewritten in such a manner as that all objectives and approaches relate to the budget.

How does this program relate to the Judicial Services program presently under contract and being recontracted for FY-81?

A position description for Court Bailiff/Process Server is not included.

Further justification for the trailer purchase is needed. How did the Tribe compile costs? What vehicle is being leased? How was this cost compiled? Office equipment will have to be defined by item and price. Some of the items listed do not appear to be equipment as classed by the Government. Also, see our comments regarding fringe benefits in sections A, B, and C."

NOTE: The fringe benefit question in A, B, and C is as follows: "Fringe Benefits are not addressed in the Budget Justification section. What percentage of fringe is being utilized, and what comprises that percentage?"

"In the Job Announcement, duties need attention. Does the probation officer stipulate conditions of probation (See item 6.)?" Item 6 in the Job Announcement states the following: "Prompt, courteous, and have an understanding of the Criminal Laws on the Papago Reservation." This is one of the qualifications required for the position of Probation Officer. "Other duties as assigned should be defined. It appears that this could be a major function: e.g., if we fund a Probation Officer we would not expect to have the incumbent doing secretarial type work on a regular basis for a judge."

NOTE: Underscoring is the Papago Tribe's emphasis on the presumption of the Phoenix Area Office determining the utilization of the Tribe's human resources. This section on duties and responsibilities which the staff is carrying out in the Adult Court is for the benefit of the people.

"On the Secretary/Translator position we can see no reason to require knowledge of bookkeeping procedures as nothing in the duties relates to that knowledge. Also, there is nothing relative to working directly in the court which would require translator skills."

Please give us an indication of how long the Bureau will be expected to fund this program. As it is written, we would assume we are looking at one year."

December 09, 1980	- The Phoenix Area Office sent a letter stating that the FY-81 Self-Determination Grant funds has been reduced from $266,124 to $255,900 as a result of budget cuts. NOTE: All grant budgets had to be reworked to reflect these budget cuts.
January 19, 1981	- After reworking the Adult Court grant proposal, the Papago Tribe resubmitted the proposal to the Agency.
January 23, 1981	- The Papago Agency reviewed the grant proposal, and wrote their submittal letter to the Phoenix Area Office.
January 29, 1981	- The Phoenix Area Office sent a letter to the Tribe stating that their office had received the Adult Court grant proposal and that "*we now have 30 days in which to review the application, notify you of any additional information which may be needed, and advise you of our recommenation.*"
February 11, 1981	- The Phoenix Area Office sent a letter to the Tribe stating that "*your Self-Determination grant application in the area of Adult Court is hereby approved. The Contracting Officer will be getting in touch with you shortly to negotiate the grant agreement. You will be provided all documents to be used in the negotiations. Approval of this application is based on tentative funding levels for FY-81. The amount may vary when FY-81 final allocations are received later in the fiscal year. If funds in this program area are reduced, the grant will have to be reduced.*"
March 05, 1981	- The Papago Tribe received the proposed grant packet for the Adult Court from the Phoenix Area Office which requested that the Tribe review thoroughly and, if the Tribe agrees to all the terms and conditions, to sign off

and return entire package to the Phoenix Area Office. Also, the Phoenix Area Office requested additional clarification and justification for the following line items:

" 1. *Office Equipment - Justification on the purchase of two typewriters with one Secretary/Interpreter being hired.*
 2. *Vehicle Lease - Description and type of vehicle to be leased.*
 3. *Vehicle Maintenance - A breakdown of cost elements included in the total allocation.*
 4. *Law Books/Periodicals - List the type of material to be purchased by title and cost.*"

March 20, 1981 - The Papago Tribe sent a letter to the Phoenix Area Office along with the signed grant documents for the Adult Court. This letter included the additional clarification and justifications requested.

Week of March 23, 1981 - Several phone calls took place between the Phoenix Area Office and the Papago Tribe's Grants and Contracts office. The Phoenix Area Office wanted to know why/who was going to use the second typewriter. That, according to the job sheets, the Probation Officer and/or Tribal Prosecutor did not have clerical duties listed and the Phoenix Area Office did not feel that the typewriter would be used full time. The Phoenix Area Office also questioned the grant period. Did the Tribe still want the grant to be backdated to October 1, 1981?

March 30, 1981 - The Papago Tribe sent a letter to the Phoenix Area Office clarifying the use of the second typewriter and stated that the typewriter would be assigned to the Bailiff/Process Server and the two court clerks.

March 31, 1981 - The Papago Tribe received a letter from the Phoenix Area Office stating that the signed grant documents for the Adult Court had been received. The following is an excerpt from this letter:

"The budget justifications appear to be satisfactory, except for the two typewriters. You stated that one machine will be shared by the Probation Officers and the Tribal Prosecutor, yet the job sheets you have provided for these psotions do not list typing as a duty, nor are the incumbents required to be qualified typists. How much utilization would the typewriters get? Could the funds be better utilized elsewhere?...

The effective date of October 1, 1980, will require change since almost half of the proposed grant period has elapsed. If the Tribe has incurred costs since October 1, 1980, a written confirmation will be required from the Superintendent of Papago Agency."

Week of April 6, 1981 - Another phone call took place between the Papago Tribe's Grants and Contracts Office and the Phoenix Area Office. The Phoenix Area Office stated again that they did not feel that the Bailiff/Process Server and two court clerks would utilize the typewriter 100% of the time and that there was no documentation that the court clerks were covered under this grant. The Grants and Contracts Office stated that this grant was for the "strengthening of tribal government" and that the court clerks were already part of the court system. The Grants and Contracts Office further stated that even though the job sheets did not list clerical duties, the Chief Judge, who supervises the Adult Court staff, stated that the staff identified to use the typewriters would utilize the typewriter 100% of the time. The Phoenix Area Office stated that the Tribe would have to write a letter of justification of who was to use the second typewriter and also submit written confirmation from the Superintendent of the Papago Agency that costs were incurred from January 1, 1981. The grant would not be awarded until this was done.

April 16, 1981 - A phone call was received from the Phoenix Area Office to the Grants and Contracts Office which notified the Tribe that they (Phoenix Area Office) had not received any documentation from the Tribe regarding the use of the second typewriter and/or confirmation that costs were incurred from January 1, 1981. Present in the Grants and Contracts Office was the Chief Judge, Henry Manuel of the Adult Courts who answered the questions which the Phoenix Area Office was requesting. Judge Manuel assured the Area Office that the court clerks and Bailiff/Process Server would be utilizing the typewriter at least 100% of the time due to the workload which the Adult Court carries. Judge Manuel also assured the Area Office that costs have been incurred from January 1, 1981.

NOTE: The Grants and Contracts Office currently has only one staff person who works on addressing all the problem areas in not only the BIA contracts/grants but also all other federal, state, etc., contracts and grants for the Papago Tribe.

April 17, 1981 - The Papago Agency Superintendent sent a letter to the Phoenix Area Office to verify that the Papago Tribe incurred costs under the Adult Court grant since January 1, 1981. Also, on this date, the Administrator for the Grants and Contracts Office handcarried the Agricultural Extension Services Contract to the Phoenix Area Office and tried to request that the Adult Court grant package be put together so that this could be handcarried back to the Papago Tribe. The Phoenix Area Office stated that it still was not in grant award form and that it would be mailed when completed.

April 23, 1981 - The Adult Court Grant Award was received by the Papago Tribe.

THIS GRANT HAS BEEN AWARDED. COPIES OF THE CORRESPONDENCE WERE NOT DUPLICATED FOR INCLUSION IN THIS CHRONOLOGY.

CHRONOLOGY for the

Agricultural, Stock and Range Management Extension and Education Services

Contract No. H50C14202293

Contract Amount $135,400

FY-81

June 25, 1980 - Submission of FY-81 P.L. 93-638 Recontract Proposals to the Papago Agency for the following: 1. Papago Children's Home, 2. Agricultural Services, 3. Tribal Court, 4. Enrollment Program, 5. J.O.M. Education, 6. Rehabilitation Center, 7. Tribal Work Experience Program (TWEP), 8. Community Education, 9. Detention and Dispatching Services, 10. Early Childhood Education, 11. Papago Farms

August 18, 1980 - Resubmittal of FY-81 P.L. 93-638 Contract Proposals, all the recontract proposals were resubmitted to the Area Office in accordance with the new format mandated by the Phoenix Area memorandum dated June 25, 1980 with the exception of the JOM Contract.

March 02, 1981 - Papago Tribe received the signed contract award for Agricultural Extension Services.

CHRONOLOGY for the

PAPAGO FARMS
Contract No. H50C1402297
Contract Amount $926,044
FY-81

June 25, 1980 - Submission of FY-81 P.L. 93-638 Recontract Proposals to the Papago Agency for the following: 1. Papago Children's Home, 2. Agricultural Services, 3. Tribal Court, 4. Enrollment Program, 5. J.O.M. Education, 6. Rehabilitation Center, 7. Tribal Work Experience Program (TWEP), 8. Community Education, 9. Detention and Dispatching Services, 10. Early Childhood Education, 11. Papago Farms

August 18, 1980 - Resubmittal of FY-81 P.L. 93-638 Contract Proposals, all the recontract proposals were resubmitted to the Area Office in accordance with the new format mandated by the Phoenix Area memorandum dated June 25, 1980 with the exception of the JOM Contract.

March 06, 1981 - Papago Tribe received the signed contract award for Papago Farms.

POSITION PAPER ON PROPOSED NEW REGULATIONS CONCERNING P.L. 93-638

The Papago Tribe of Arizona would like to point out that in the past, regulations published in the Federal Register allowed 45 days for comment, thereby allowing sufficient time for adequate research. This has not been the situation this year. We protest inadequate time for valid and appropriate comment.

Our comments on the Proposed Regulations are as follows:

> We are concerned that the changes in 93-638 to accommodate provisions set forth in 95-224 are in violation of the self-determination concept as mandated in P.L. 93-638. P.L. 95-224 does not address Indian sovereignty or procedures to grant directly to Tribal Governing bodies thereby following the concept of Federal Trust Responsibility and Historical Direct Relations.
>
> One possibility is to recognize the tribal entities as the 51st State and accept the Secretary of Interior as Governor for administration of Block Grants. However, we are reluctant to accept the Bureau of Indian Affairs as Block Grant administrator because of their loss of credibility with the Tribes, i.e., their most recent arbitrary and capricious actions in dealing with the budget cuts.

We feel that the BIA administrations self interest has become paramount in their actions. They have failed to comply with procedures mandated by Federal Regulations and are refusing to attempt to comply. Example: BIA Education was to have ISEP (Indian School Equalization Program) Formula Funding in place by 1980 for Early Childhood Programs on the reservation and budgeted for those programs in FY 1982. This was not accomplished and no plans are forthcoming to accomplish it.

Perhaps our comments on the present changes in regulations will also be an exercise in futility. If our comments and recommendations are included, will they be implemented or patently ignored as may many of the present regulations.

This is either a result of tragically inept and inefficient administration or a deliberate attempt to subvert the intent of Congress.

We endorse Secretary Watts statement in the letter dated May 8, 1981, signed by James F. Canon:

> "In conversion from a contract (i.e., procurement) mode to a grant (i.e., assistance) posture we will bring about a subtle though major change in the internal manner in which the Bureau will carry out its

> monitoring and fiscal accountability responsibilities. The line officers of the Bureau will have primary responsibility in the grant pre-application, application, award and post award processes involved. The award of the grant will be made by line officers rather than the contract officers."

Those line officers should be agency superintendents responding directly to the Tribe and to the Commissioner in Washington. Area Office should only furnish technical assistance if requested.

The Papago Tribe also requests that this agency be furnished with a competent superintendent acceptable to the Papago Tribe rather than an acting superintendent who is at the agency only one or two days per week. This condition has existed over 14 months.

We have reviewed the solicitors opinions of April 28, 1981, on "Indian Self-Determination and Educational Assistance Act." While we find the learned solicitors opinion well founded in his statement of the law, we take issue with his opinion that P.L. 95-224 must prevail as a later expression of Congress, since in no section of the law does it expressly refer to Indian Tribes directly or by inference.

Attachment B

271.6 Definitions

"References to Tribal Government and trust deleted; Repetitive of overall BIA Policy."

We definitely oppose the above. Law and regulations are redundant by nature but they do provide a specific mandate while policy is as concrete as a vagrant breeze. We require specificity in references to Tribal Governments and trust responsibility.

271.3 We approve of this section and insist that it be complied with, especially "(a) consulting with Indian Tribes, and national and regional Indian organizations." However, delete the words, "to the extent practicable." This leaves an open opportunity for the BIA to meet only with those captive organizations that will always agree. (b) change "30 days" to read 45 days.

271.12 Add (7) Programs or parts of programs determined by the Tribal Governing Body to be in the best interest of the Indian Tribe where sufficient funding is available or where funding can be made available by discontinuance of a Bureau program not within Tribal interest.

271.14 (4) add "copies of agency monthly budget printouts and Area Office budget print outs."

271.16 Add to (a) "Tribal originated programs to replace or supercede present Bureau Programs."

271.19 Delete and insert following

A. Superintendent shall award and administer grants in accordance with policy and procedures published 25 CFR 271, Grants under Section 102 of the Indian Self-Determination Act, and in this Manuel.

B. Application Complete - No Declination Issues. When the Superintendent determines that the tribal organization has submitted a completed application, that no additional information is required, and that no declination issues exist, he shall provide written notification of this to the tribal organization and/or tribal governing body. The Superintendent shall begin negotiations and award a grant within 30 days of the notification to the applicant unless a later date is mutually agreed upon.

C. Negotiations. The dictionary definition of negotiation is "to confer, bargain, or discuss with a view to reach an agreement." In the broader Federal procurement sense, procurement by negotiation is the art of arriving at a common understanding through bargaining on the essentials of a contract such as delivery, work requirements, prices and terms.

The Bureau's technical and administrative personnel, including Grant Officers, may be called upon to assist tribes in: (1) developing their "638" applications; (2) rectifying declination issues; and (3) establishing tribal management systems.

The most common misconception is that grant price is the only negotiable item. For example, a given tribe knowledgeable of the available dollars for a Bureau program may want to develop its own program requirements. Once their application for a grant is approved the tribe may conclude that any subsequent negotiation is fruitless. On the contrary, the negotiation of the work statement describing the plan of operation, the special and general provisions is equally if not more important.

Negotiations are necessary so that both parties are in agreement and have a clear understanding of how, when and where the work is to be performed as well as the respective responsibilities of the Bureau and the tribe.

D. Award Process. At the completion of the negotiations, the grant document will be prepared in accordance with any agreements reached. Care will be taken to assure that the grant document accurately reflects what was agreed to during negotiations, that all required or special clauses have been included, and that a copy of the authorizing resolution(s) from the tribal governing body is attached to and made a part of the document.

When the authorizing resolution(s) require(s) review of the grant by the tribal governing body prior to award, a copy of the grant will be sent to the tribal governing body in accordance with the resolution prior to submission to the tribal organization for signature. If the tribal governing body's resolution does not require review prior to award, this step will be omitted.

A copy of the transmittal letter to the reviewing tribal governing body shall be sent to the applicant if different than the tribal governing body so that the status of the grant process can be communicated. In the transmittal to the tribal governing body, an indication of the time remaining for the Bureau to award a grant without violating the time constraints imposed by the regulations shall be given. This time can be extended only at the request of the applicant, but the applicant should be aware of the tribal governing body's review requirements in the authorizing resolution and will have requested sufficient time to allow for this review. The authority for grant approval is conditional until the tribal governing body has agreed to the document itself. Upon receipt of the grant document, the tribal governing body should complete its review in accordance with established tribal procedures.

Comments or suggestions on the document must be made in writing to the Superintendent. Copies of these comments may be forwarded to the applicant by the tribal governing body if it so desires.

Following the review by the tribal governing body, the grant document and any comments made by the tribal governing body will be sent to the applicant tribal organization for its review. If the tribal governing body's comments are not of a substantive nature, the Superintendent may incorporate the comments by modifying the grant document. However, the applicant must be made aware of these minor modifications in the letter transmitting the document and the tribal governing body's comments. If the comments are substantial and generate major revisions to the grant, the applicant and the grant office will re-enter negotiations. If the tribal governing body wishes to re-define the scope of the grant to be something different than originally authorized and defined during the original negotiation of the contract, it can do so only through a resolution passed by the tribal governing body.

In cases of disagreement between the applicant tribal organization and the tribal governing body, these differences must be resolved by those two parties before the Bureau will award a grant.

When the tribal organization has completed its review of the grant document and there are no problems with any modifications that may have been made on the basis of tribal governing body comments, it should sign the grant and return it to the Superintendent. If there are modifications which must be clarified or with which the applicant does not agree, it should contact the Superintendent to resolve any differences prior to signing.

Upon receipt of the signed grant, the Superintendent shall review the document to see if any modification has been made. If there are no changes, or if there have been only minor changes which do not substantially modify the grant and thus do not require further negotiation, the Superintendent shall sign the grant on behalf of the Bureau and distribute copies in accordance with local requirements.

E. Appointment of Grants Officer Representatives.

1. Pre-Award Duties. The Superintendent is responsible for ensuring that grant agreements are reviewed and executed in accordance with applicalbe laws, regulations and sound business practices. The Superintendent is responsible for administering grant projects until completed and is responsible for ensuring that additional actions are taken prior to closing out grants and retiring grant records. Certain tasks may be performed by staff under supervision of the Superintendent and certain functions may be delegated to a representative of the Superintendent provided that such responsibilities are clearly defined in writing. Such representatives are designated as "Grants Officer Representatives" (GORs).

The GOR may be appointed from Area Office staff or from Agency staff depending upon the nature of the grant project, Area and Agency staff limitations and individual expertise. Appointment of the GOR is a responsibility of the Superintendent but appointment should be made with approval of the Area Director if Area personnel are involved and should be compatable with the Tribe. It is advantageous to appoint a GOR during the application review process. An early appointment affords the GOR an opportunity to become familiar with the proposed project and to provide assistance in resolving preaward problems. All of the following procedures shall be included when establishing responsibilities for GOR's.

2. Insofar as practical, the Agency Superintendent, will appoint an employee to serve as GOR at the time the Superintendent receives the grant application or letter of intent from the tribal organization or tribal governing body. That agency employee should participate in the Agency Office review of the application in order to gain maximum familiarity with the project prior to funding.

3. The Superintendent will formally appoint the GOR by letter. The GOR shall sign and return a copy of that letter, signifying understanding and acceptance of the responsibilities.

F. Agency Superintendent for Education. Section A, B, C, D & F apply to the Agency Superintendent for Education.

The Agency Superintendent provides administrative support services to the Agency Superintendent for Education.

G. Indian Technical Assistance Center. When the Superintendent determines that the tribal organization has submitted a completed application to enter into a grant agreement for all or part of the Indian Action Team program, the Agency Superintendent will forward the original file to Chief, Indian Technical Assistance Center for review and a copy of the file to the Area Office for information purposes.

After receiving an application to grant for all or part of the Indian Action Team program and the comments and recommendations of the Chief, Indian Technical Assistance Center, on the application, the Director, Office of Tribal Resources Development, shall take all actions required of an Agency Superintendent by paragraph (B), (C) and (D) of this section.

H. Construction Building and Utilities Program. When the Superintendent determines that the tribal organization has submitted a completed application to enter into a grant agreement for all or part of the Construction, Building and Utilities program, the Superintendent will forward the original file to the Division of Facilities Engineering for review and a copy to the Area Office for information purposes.

After receiving an application to enter into a grant agreement for all or part of the Construction, Building and Utilities program which is grantable under this part and which the responsibility of the Division of Facilities Engineering and the comments and recommendations of the Chief, Division of Facilities Engineering, on the application, the Director, Office of Administration, shall take all action of an Agency Superintendent by paragraphs (B), (C) and (D) of this section.

271.20 Delete and Substitute the following:

A. Criteria for Declination.

(1) The Commissioner may decline to award a grant only for the specific causes given paragraph (b) of this section. The burden of proof is on the Commissioner to demonstrate, through substantial evidence, that one of the specific grounds for declination exists and that, therefore, the application must be declined.

(2) The Commissioner may decline to award a grant when:

(a) It can be demonstrated by the Bureau by substantial evidence that the program will yield results which will be deleterious to the welfare of the Indian people to be served.

(b) The application indicates that the applicant has no procedures to assure that services and assistance shall be provided to the Indians affected by the grant in a fair and uniform manner.

Such procedures include eligibility criteria for a tribal member to receive services; recordkeeping adequate to verify the fairness and uniformity of services in case of formal complaints; and adequate complaint procedure available to all Indian affected; and those rights the individual will retain following the complaint.

(c) Adequate protection of trust resources is not assured. Criteria for determining if there is adequate protection of trust resources are given 271.34.

(d) The proposed project or function cannot be properly completed or maintained by the proposed grant.

(e) The application is not within the purview of P.L. 93-638, Section 107 (a) and 20 BIAM 1.6, definitions.

(3) In arriving at his finding, the Commissioner shall consider whether the tribal organization would be deficient in performance with respect to the factors listed in this paragraph.

(a) Equipment, buildings and facilities. The same standards with regard to buildings, facilities, or equipment shall be applied to tribal organizations that have previously been applied to the Bureau. As provided in 271.44 the Bureau shall make available the use of all equipment which has been allocated to the operation of the program by the Bureau in the past, unless the Bureau proves the provision of the equipment will seriously interfere with the Bureau's ability to provide services to Indian people in nongranted programs. Where equipment is shared by the programs to be granted and other nongranted programs, equipment-sharing or other suitable arrangements shall be stated in the grant agreement.

(b) Bookkeeping and accounting procedures. It must be clearly demonstrated by the Bureau that the Tribal organization does not have or cannot set in place, an accounting and bookkeeping system which will be adequate. Actual performance of tribal bookkeeping and accounting systems under prior year will be considered in this determination.

(c) Substantive knowledge of the program.

(i) Where the tribal organization proposing to grant is the tribal governing body and the program function to be granted is a tribal governmental function, there shall be an absolute presumption that the tribal governing body has substantive knowledge of the program or function.

(ii) Where the tribal organization is not the tribal governing body or the program or function is not a tribal governmental function, the tribal organization shall be presumed to have substantive knowledge of the program if the tribal organization meets one or more of the following conditions:

(a) The tribal organization has adequately managed a similar program before.

(b) The tribal organization which is to manage the project possesses by virtue of its knowledge and/or experience substantive knowledge of the program.

(c) The tribal organization has been a consumer of such services in the past and thus has developed an understanding of the issues involved with the program sufficient to enable it to effectively carry out the operation; and, the tribal organization can secure through the resources of Bureau staff or other resources, the training in the particular subject area which will develop its substantive knowledge of the program.

(d) Community support. Before the Bureau can enter into a grant there must be a request made in accordance with 271.15. The tribal governing body's resolution under 271.15 shall be presumed to demonstrate that there is community support for the proposed grant. Unless it can be demonstrated by substantial evidence that there is a lack of community support for the grant and the lack of support will result in unsatisfactory services, inadequate protection of trust resources or impossibility of service maintenance, the tribal governing body's resolution shall be deemed conclusive.

(e) Adequacy of trained personnel. The adequacy of trained personnel available to the tribal organization to carry out the proposed grant will be presumed if any of the following conditions exist:

(i) If the tribal organization has a personnel system that prescribes minimum occupational qualification standards which insure equal access to all qualified tribal members; procedures for the selection of personnel on the basis of such standards; and the personnel to be used under the proposed grant are to be employed under the personnel system.

(ii) If there is no tribal personnel system, it will be assumed that the personnel to be employed under the proposed grant are adequately trained if the tribal organization has established position descriptions for key personnel to be employed under the grant and agrees to establish a personnel system similar to the one described in paragraph (c) (5) (i) of this section.

(f) Other necessary components of grant performance.

(i) All other necessary components of grant performance will be deemed to be met unless a tribal organization:

(a) Does not agree to develop an adequate personnel system that provides selection standards which insure equal access to all qualified tribal members;

(b) Has not agreed to establish and maintain a property management system as required in 25 CFR Part 276.

(c) Has not agreed to keep such records and make reports required by 25 CFR Part 276 or to make such reports and information available to Indian clients as required by the grant agreement.

(ii) All "other necessary components" have been specifically identified in this section. No other components shall be defined which may serve as a basis for declination unless they are added to these regulations by revision or amendment of the regulations.

(d) Program plans and designs of tribal organizations for grant operation of Bureau programs or parts may be inconsistent with other parts of this chapter if a waiver is obtained from the Commissioner. Inconsistencies between such plans and designs and Bureau manuals, guidelines or other procedures that are appropriate to programs or parts of programs operated by the Bureau are not grounds for declination.

(e) Tribes; or tribal organizations acting under delegated authority pursuant to 271.15 (b) (2) (vii); may request from the Commissioner a waiver under 25 CFR 1.2 of any regulations in this chapter.

(f) Bureau officials may not decline to enter into a grant with a tribal organization because of any objection that could be overcome through the grant.

Within 60 days after receiving the application, or renewal, the Bureau will approve the request, unless the Commissioner notifies the applicant that the request cannot be accepted because there are insufficient funds or there are declination issues (see Sec. 217.20) involved. The notice shall be in writing and shall contain:

A. Identification of the specific objections that the grant cannot be entered into.

B. Specific recommendations or actions required by the applicant to overcome objections and a description of the nature, scope and source of the technical assitance which will be available to overcome objections.

C. Superintendents Recommendations to decline.

1. If the Superintendent, the applicant and the tribal governing body fail to resolve the declination issues, the Superintendent shall prepare a written recommendation to decline and submit same to the Tribe prior to forwarding.

2. This recommendation shall contain at a minimum, the following information:

(a) Identification of specific objections, categorized under one or more of the declination factors set forth in 271.20.

(b) Specific recommendations on actions required by the applicant or tribe to overcome objections.

(c) Descriptions of the nature, scope and source of the technical assistance which has been provided or offered by the Bureau to assist the tribal organization to overcome declination objections.

(d) Copies of all correspondence between the Agency, area and applicant.

D. The written recommendation to decline to enter into a grant agreement shall be forwarded to the Commissioner of Indian Affairs through the Area Director.

E. Agency Superintendent for Education. Section A and B apply to the Superintendent for Education.

The Agency Superintendent and the Area Office Education Program Administrator provide support services to the Agency Superintendent for Education.

271.21 Change to read:

271.21 Approval.

Within 60 days after receiving the application, or renewal, the Bureau will approve the request, unless the Commissioner notified the applicant that the request cannot be accepted because there are insufficient funds (in such cases available I.M.P.L. fund's may be used to augment appropriated funds) or there are declination issues (See Section 271.20) involved. The notice shall be in writing and shall contain:

Add the following:

1. Insufficient Funds.

A. Insufficient Funding. If funds are not available at the Agency to adequately finance the proposed grant without significantly reducing services under the nongranted programs or parts of program, the Superintendent shall so notify the applicant in writing and offer alternative solutions to the funding problem. The applicant may propose alternative solutions to solve the funding problem. Upon receiving written notice of the applicant's choice of alternative(s), the Superintendent and the tribe shall determine whether the alternative(s) chosen will solve the funding problem. If the applicant's choice of alternative(s) is sufficient to solve the funding problem, or if the solution involves reprogramming which requires congressional action, the Superintendent shall take the actions in paragraphs (2) (d), or (e) of this section, as appropriate. If the applicant's choice of alternative(s) will not solve the funding problem, the applicant shall be notified in writing and will be asked to reconsider the matter and select another choice. After the applicant has reconsidered and notified the Superintendent in writing of its second choice of alternative(s), the Superintendent shall determine whether the applicant's choice is sufficient to solve the funding problem. If the Superintendent determines that the applicant's second choice of alternative(s) will not solve the funding problem, or if the applicant refuses to make a selection, the Superintendent will refer the funding problem to the Commissioner for a decision. The Superintendent shall notify the applicant of the referral in writing. An additional 15 days shall be allowed for the Superintendent to try to resolve the funding problem. The alternative offered by the Superintendent may include the following which can be used alone or in combination to solve the funding problem:

(1) The Bureau may make available additional funds resulting from savings in other Bureau programs, subject to established reallocation or reprogramming procedures or I.M.P.L. Funds may be used to augment appropriated funds.

(2) I.M.P.L. funds may also be used to augment inadequate appropriated funds.

(3) The tribe(s) may obtain grant funds under part 272 of this chapter to cover any initial "start up" cost included in the proposal.

(4) The Bureau may redesign or consolidate operations involving nongranted programs or parts of program.

(5) The tribe(s) may redesign the grant proposal or consolidate all or parts of the proposal with other tribal programs.

(6) The tribe(s) may obtain additional funds from sources outside the Bureau to supplement the Bureau funds available to finance the proposal.

(7) The tribe(s) may accept lower service levels under the proposed grant or under the nongranted programs or parts of programs, except where such lower levels are inconsistent with the requirements of regulations or statutes, through reallocation or reprogramming of Bureau funds.

(8) The tribe(s) may choose to withdraw the contract proposal and allow the Bureau to continue to operate the program either as presently operated or as redesigned by the tribe(s).

If funds are available at the Agency to adequately finance the proposed grant without significantly reducing services under the nongranted programs or parts of programs, the Superintendent shall make in writing to the applicant and the tribal governing body those recommendations which he determines are needed in order to avoid possible declination and shall indicate the technical assistance available from the Agency Office to correct any deficiencies. This action shall also be taken within 30 days after receiving the application.

B. Agency Superintendent for Education. Section A is applicable to the Agency Superintendent for Education.

The Agency Superintendent and the Area Office Education program administration provide support services to the Agency Superintendent for Education.

271.23 Appeals

Delete (b) as unacceptable and arbitrary

271.32 (4) (viii) Determination of kind of livestock to be grazed on tribal land. This is too paternalistic and Bureaucratic and violates tribal sovereignty.

271.32 (4) (ix) "Establishment of grazing fees."

This is also a tribal prerogative.

Delete 271.32 (5) (i) (ii) (iii) (iv) (v) also violates tribal sovereignty and self-determination.

271.33 (a) (1) (2) this information will be furnished to the tribe by the BIA.

271.41 Applicability of 25 CFR 276

Special grant conditions more restrictive then Part 276 may not be imposed by the Bureau. Delete (1) and (2).

Since we are revising regulations the Papago Tribe feels there are portions of 272 grants under Section 104 of the Indian Self-Determination Act that could be improved as follows pursuant to 272.4 (f).

Part 272 Revisions

Add 272.12 (b) (c) Funding of Tribal operated Education programs and schools tribally owned and operated.

Delete 272.17 (a) and replace it with:

(a) Approval authority for approval of a grant application under this part shall be with the Superintendent or Agency Superintendent of Education when the intent, purpose and scope of the grant proposal pertains solely to an Indian tribe or Tribes located within that superintendent's administration jurisdiction.

Add 272.17 (c) (3) as follows:

I.M.P.L. funds or funds appropriated under other activities as agreed upon by the superintendent and the tribe.

Delete 272.19 (b) (5)

Delete 272.21
272.22
272.53

✓

25 CFR PART 273 - EDUCATION GRANTS UNDER JOHNSON O'MALLEY ACT

No need is being served and no point is being gained by including Johnson O'Malley education functions within DOI's proposed Consolidated Tribal Governmental Program. P. L. 93-638 provided an adequate, time-tested, tribally supported, proven mechanism through which DOI/OIEP funding for Indian Education services can be made available to tribes. P.L. 93-638 is cost-effective, since the expenses of program management are included in each contract or otherwise absorbed by the tribes--not by the BIA. The proposed consolidation of programs violates Congressional intent of P.L. 93-638, since it is not clear that the federally-recognized tribes and Alaskan Native entities want such consolidation, nor has the BIA sought or heeded tribal opinion to clarify tribal positions on this matter. The proposed consolidation likewise violates the Congressional intent of Title XI, P.L. 95-561, since section 1126 of the Act makes the administration of all DOI/OIEP programs independent of the other functions of the BIA. Congressional intent, like tribal sovereignty, should not be callously disregarded by the Consolidation proposal.

273.5 Eligible Students

Change to read: Indian children from age 0 through grade 12, (rest of paragraph as stated).

Age change from 3 years to 0 will be consistent with 62 BIAM 4.1 A (1) (2), B (1) (2) (3), D (1) (a) (b), E (2) (a) (b) (c) (d) (e).

273.11 Purpose and Scope (Comment)

(b) The "on the near" population of the Papago reservation has been determined by court decision.

273.40 Applicability of 25 CFR Part 276

Delete special grant conditions (1) (2) (3).

276.18 (a) change "recipient organization" to read "Tribal organization," the Papago Tribe believes that pursuant to P.L. 95-224, the two should be held equal to the states and not be classified as other.

Delete 277.21 (1) (2) Special Grant conditions

Delete 277.25 Our review has been cursory and research in depth was not possible, the Acting Secretary's letter was written on May 8, 1981, and not received at the tribal office until May 14, 1981, therefore, within the 30 day review procedure we have until June 14, 1981, to mail our comments with an additional 5 days for mail time. We believe that 45 days would be more appropriate in the future.

Senator DECONCINI. We will proceed with our next panel.

STATEMENT OF GEORGE JIM, PRESIDENT, ASSOCIATION OF NAVAJO COMMUNITY CONTROLLED SCHOOL BOARDS, ACCOMPANIED BY BEN BARNEY, ROCK POINT COMMUNITY SCHOOL; JAY MOOLENIJZER AND DOROTHY YAZZIE, BLACK MESA COMMUNITY SCHOOLS; ROGER BORDEAUX, ASSOCIATION OF CONTRACT SCHOOLS; AND BRUCE HOFFMAN, ROCK POINT COMMUNITY SCHOOL

Mr. JIM. Mr. Ben Barney will introduce the rest of our panel.

Mr. BARNEY. Mr. Chairman, I would like to introduce the rest of the panel members. We came and worked together on our presentation so we would like to coordinate within the time that we have so that some of us will just be presenting statements that we have written and the rest of us will be proceeding through.

I would like to present Jay Moolenijzer and Dorothy Yazzie from Black Mesa Community School in Arizona and Roger Bordeaux, who is representing the association of contract schools, with a number of members of contract schools, and George Jim, who is the president of the Association of Navajo Community Controlled School Boards, and Bruce Hoffman, who is representing the Rock Point Community School, and myself representing the Rock Point School. We will just proceed in the order that we have told each other to present, if it is all right, and we will start with George Jim.

Senator DECONCINI. Let me just caution you. We have a time constraint and I realize you have come a long way and put a lot into this. I can assure you your full statements will be put in the record. If you can summarize, though, it will give us an opportunity to hear from everyone.

If you will proceed, Mr. Jim?

Mr. JIM. I am George Jim and I am representing the Pass Contract School and I also am president of the Association of Navajo Community Controlled School Boards, which has nine members.

I have a statement on the records and recommendations on the contract school overhead costs under Public Law 93–638 to submit later.

Senator DECONCINI. Thank you. We will be pleased to receive your statement for the record.

[The statements follow:]

PREPARED STATEMENT OF GEORGE JIM, PRESIDENT OF THE ASSOCIATION OF NAVAJO COMMUNITY CONTROLLED SCHOOL BOARDS

Mr. Chairman, members of the Select Committee and staff, my name is George Jim. I am a Navajo Indian from Littlewater, N. Mex. I am about as grass roots as you can get. My first language is Navajo, so I ask you to please be patient with me while I try to speak in English on behalf of the people back home.

I have been the president of the Borrego Pass School Board which contracts under Public Law—93–638 for the past 3 years, and am also President of the Association of Navajo Community Controlled School Boards, representing nine contract schools serving the Navajo Reservation.

I have a prepared statement which I am submitting for the record including four recommendations on contract school overhead costs. I will not read it here.

Instead, let me summarize by saying that BIA has created more confusion than ever by its efforts to establish guidelines for contract school indirect costs and at the same time cut down on the need for contract support funds. We see no end to the problem yet, and we do not trust BIA to solve it.

We believe that we are entitled to the resources to provide all the overhead functions that BIA provides for its own schools.

We believe that the only way we will ever really get these is if the Congress itself mandates an overhead cost formula to be added to the Indian School Equalization Formula for contract schools.

In addition, we need some way of securing a fair share of these costs from the other Federal agencies, such as the Department of Education which fund programs at the school, and the indirect cost rate does not seem to be what we need for this purpose. It has too many problems in it.

And finally, some other contract schools may want to keep their indirect cost rates until a new system has been proven workable. They should have the right to do so.

Thank you, Mr. Chairman.

Prepared Statement of George Jim, President of the Association of Navajo Community Controlled School Boards

I have been asked to testify on contract school indirect costs. This is not a simple subject. The American Indian Law Center prepared an analysis of BIA indirect cost procedures and practices in March of this year. In this analysis the Law Center said that "very few people within BIA, in the tribes, and in the related organizations really understand the processes" with which we are trying to cope. This is true. There is much confusion. I can only give one view of the matter. I will use parts of the Law Center Report to simplify even that.

We were a contract school long before Public Law 93–638 was passed. Back in the early days, all our funds were program funds, in exactly the same arrangement the Law Center now recommends. BIA expected us to pay all our overhead costs out of the same funds that a BIA school had for services to children. BIA turned a deaf ear on our arguments that their schools received many services under other budgets than their education funding, so our director kept the financial records, and our bus drivers did the maintenance, and so on.

We have been there. We are suspicious of BIA's tendency to suggest that contractors take overhead costs out of program funds. We will continue to be suspicious unless BIA also amends the equalization formula to include the "overhead cost of contracted education programs" required by Public Law 95–561. Such a formula would give us a fair share of BIA's overhead budgets comparable to those a BIA school would have for services to students.

We do not see them developing such a formula.

Instead, we see a frightful combination of open competition between contractors for a shrinking pot of money, and vague contradictory guidelines giving BIA officials almost unlimited discretion as to who gets what. We are now in the final countdown to negotiations for a new contract and lump sum agreement, and all BIA has to guide the contracting officer is a set of interim guidelines issued in September of 1981, in which the Law Center recommends major deletions from and then says the utility of the remaining portions is "highly questionable."

In the meantime, our contracting officer has told us that he will probably not be the responsible party for negotiations, since BIA is converting to grants instead of contracts. He says education personnel will be responsible for negotiating grants and related overhead costs. The Law Center Report also called attention to the fact that a new and different set of Federal regulations probably governs the overhead costs for grants, for nonprofit organizations such as ours. And finally, the area director has just given us a whole new set of management criteria to be met in our personnel, property, and financial management systems, under the new grant making procedures.

Mr. Chairman, the Law Center has a good grasp of what must be done in the long run. But they seem to be blind to BIA's ability or willingness to do it. A year or so ago we asked the committee to take the matter out of BIA's hands, and to get an independent agency such as the Library of Congress research staff to establish an overhead cost funding formula for the contract school. We recommended that GAO or a similar agency establish exactly the kind of "BIA overhead cost rate" for BIA programs which the Law Center recommends, and that this be used to fund the formula. And we recommended that the formula also include the additional costs of contracting which BIA would not have spent operating the school directly, just as the Law Center recommends.

Nothing we have seen from BIA itself has given us any reason to change these recommendations. We do not believe that BIA's bureaucrats are competent to handle the problem themselves. They have too much conflict of interests over breaking up their administrative empires. They created the contract support fund, and all the problems the Law Center traces to it, in order to keep their own overhead departments immune from contracting, and they have nothing to lose by maintaining the present level of confusion.

As a result, I would like to make the following recommendations for your consideration.

1. That the Committee require BIA to publish immediately an official description and procedures for negotiating a lump-sum agreement for those overhead operations not covered by the equalization formula, which are provided elsewhere in BIA's budget for BIA operated schools, as a contract school option for fiscal year 1983.
2. That the Committee require BIA to include, as a further option for those contract schools which also operate non-BIA federal programs, an adaptation of the lump-sum agreement under which BIA establishes the total overhead costs for the contractor, and assists the contractor in negotiating a separate pro-rata share lump-sum agreement with each federal agency having a program at the school, based on that agency's proportionate share of the contractor's total program.
3. That the Committee take whatever actions are necessary to require BIA to incorporate adequate funding for the overhead costs of contracted education programs in the equalization formula within a year, including placing the matter in the hands of agencies under direct control of the Congress if necessary.
4. That the Committee assure those contract schools wishing to continue indirect cost rate arrangements that they have the option to do so until adequate alernate procedures have been established, deficiencies identified, and remedied to the Committee's satisfaction.

Mr. Barney. Ms. Dorothy Yazzie, school board member of the Black Mesa Community School.

STATEMENT OF DOROTHY YAZZIE, SCHOOL BOARD MEMBER, BLACK MESA COMMUNITY SCHOOL, ROUGH ROCK, ARIZ.

Ms. Yazzie. Mr. Chairman, my name is Dorothy Yazzie. I represent my community as a chapter secretary and also represent my school as the new director of the Black Mesa Community School, and I speak for Native American parents across the Nation, as the mother of a 6-year-old whose education and future depends on the decision that you and the BIA will make on these policies.

With the enactment of 93–638, the Congress of the United States recognizes and establishes the right of the American Indian to influence and control their affairs. These rights include the right to provide for the education of their children. Further, Congress mandated that our children be able to live at home while attending school, providing a provision for a day-school education.

These rights, I feel, are threatened by the proposed revisions in the 638 and the indirect cost plans. As written, these proposals undermine our school. Most Indian communities are small. We do not live in large cities or in large populations. We live in rural communities spread out and often very isolated.

The only way we can keep our children at home as part of a family is in small community schools. The other alternative to this is to send our little children away to boarding schools.

When I was younger, at age 6 I was sent away from my family to attend a boarding school and did not see my family for as long as 9 months out of the year. Being far away at a young age did not strengthen my family ties, my community ties, and certainly did not encourage my self-image or concept. It alienated me from my family, community, and my people.

It is amazing that some of us go through this and still come out being able to deal with the life that we face, but many of our people do not make it through. I do not think my child or any other children from my community or any other Native American community should repeat what I have gone through.

I am a new director at Black Mesa Community School on the Navajo reservation so I am not really familiar with the problems that a small school faces in trying to continue the program. But as a community member I know that we have fought a long time to get a school and how important it is. And I know many of our neighboring communities and also other Indian communities would like to start their own community school, too. But with this funding system and allocation and all these other procedures that are coming through, it seems like it is working against us, but rather works for larger boarding school operations.

As a small school we face a lot of crisis, insufficient funds, and we barely provide enough to operate the educational program. We never have enough money for operations and maintenance programs. We also end up having to use direct moneys to cover the short-falls.

I believe parents and children have the right to live together as a family. I believe Indian communities have the right to a local day school. I believe Congress mandated these rights to be respected. I ask, how firm is your commitment?

Thank you.

Senator DeConcini. Thank you.

Mr. Moolenijzer, do you have a statement or comment?

STATEMENT OF JAY MOOLENIJZER, EXECUTIVE DIRECTOR, BLACK MESA COMMUNITY SCHOOL, ROUGH ROCK, ARIZ.

Mr. Moolenijzer. Mr. Chairman, I will try and be very brief. We have been asked to speak on this panel on issues that small schools are facing.

As you know from my discussions with you, we have been facing, over the last 3 years, one crisis after another. These are basically, an inadequate funding system and insufficient funds in the system. The proposed "638" regulation changes make a system that was inadequate more inadequate. Specifically, in the section on new school starts, and other areas, as Ms. Yazzie brought up, the administrative burden, the burden of the application process, small schools are threatened.

The Bureau's indirect cost plan makes no special provisions for the small school and rather than get into a lengthy discussion on it, my point being that both through our direct program and our indirect administrative expenses, please, let us establish a base funding level so that we can get about our business, and that is educating children in our communities.

Thank you.

Senator DeConcini. Thank you very much.

STATEMENT OF ROGER BORDEAUX, EXECUTIVE DIRECTOR, ASSOCIATION OF CONTRACT TRIBAL SCHOOLS, ST. FRANCIS, S. DAK.

Mr. BORDEAUX. Mr. Chairman, my name is Roger Bordeaux. I represent 31 contract schools that belong to the Association of Contract Tribal Schools nationally, from Arizona all the way up to Maine, and down into the Southwest.

First of all, I would like to commend this committee for their recent budget recommendations that they sent down. It appears that they listened to us the last time we were up here and I hope that this committee follows through on those.

Our association is really concerned about the discussion we are having today on indirect costs and also on the "638" revisions. I think the main thing with indirect cost has been stated almost all morning, from tribal representatives, that if the Bureau would follow through on the different regulations and some of the circulars and everything else that they have to follow through on anyway, I think a lot of the problems that we are having would be alleviated.

In regard to "638," I think, when the legislation was passed in the 1970's everybody felt that this was going to be the way to go and this was going to be it. It appears that the Bureau does not want to take on their half of the responsibility and they want to add more responsibility to the tribes and tribal organizations. As long as they keep trying to do that, the self-determination concept is never going to be fulfilled.

Thank you.

Senator DECONCINI. Thank you, very much.

You know, it sounds to me like the problem is getting worse, rather than better, and it just cannot help but occur to me as we listen, year after year, that I have been here, the BIA nonfunctioning is directed, in refusing to consult and counsel. I cannot help but think that maybe the BIA is a mistake to have. If I could figure another way of disbursing the funds and arriving at the need, I sure would like to try it. I do not know if anybody has any suggestions.

Mr. BARNEY. Next we have Birgil Kills Straight, and Mr. Bill Berlin, and ourselves.

STATEMENT OF BIRGIL KILLS STRAIGHT, EXECUTIVE DIRECTOR, LITTLE WOUND SCHOOL BOARD, KYLE, S. DAK.

Mr. KILLS STRAIGHT. I am Birgil Kills Straight. I am the executive director of the Little Wound School in Kyle, S. Dak.

Also here with me is Walt Hernandez, the chairman of the board. He is not up here at the table.

What I want to do is send a detailed response to some of the things that were discussed here. I have not had the opportunity to look at the report that has been conducted by the American Indian Law Center. It was only yesterday that I received some of the information that was discussed here.

Little Wound, however, is the largest contract school in the Nation. We were able to pull together another area which in the past had never been done before. It was in the area of construction of a new facility by the local board. I have several issues that I want to address.

No. 1, insurance. It has been pointed out that the Federal Government owns the building. In our particular case at Little Wound School, we have had a roof of a gym burn approximately 4 years ago. It was during the wintertime and the floor of the gym did not quite dry until that summer and when it did the floor warped. If we were not a contract school, we would have operated those 4 years with a gym and a dining room without any roof.

Fortunately, we had another program which dealt with adults in a vocational training program who had repaired the roof in that unfortunate incident within a couple of months. The insurance part of it, is that if we had insured it, I am sure it would have been taken care of back then. However, we are allowed to insure only for liability matters in our contract and we were informed that the Federal Government is its own insurance agent and will repair major problems in facilities. Four years would have been a long while to wait.

No. 2, transportation. It takes us approximately 2 years to receive any buses that we may have wanted through the GSA process. If we went outside of it, we had to pay for the vehicles from sources other than the school operations contract. Currently, the title I program is going to begin giving us our funding based on contracts that we have executed, and the new terminology is front-end loading. They will give us so much in advance.

We prefer that much more than expending the money first and then receiving it later. In some cases, it is never received at all.

In regard to the buses, we felt that these were GSA buses that were initially given to us under the contract and in order to replace them, if we chose to, we should be given the chance to negotiate for funding on top of the contract instead of deducting it from the contract.

No. 3, plant management. There are several other areas like improvement and repairs, including plant management. We are forced currently to operate a large building complex with approximately a $126,000-a-year contract. The BIA themselves admitted it would take no less than $310,000 a year. Ideally it should have been around $800,000-a-year contract.

[Subsequent to the hearing the following information was received for the record:]

The Bureau of Indian Affairs acquired the building from the general contractor on April 23, 1982. We assumed the responsibility of the operation and maintenance of the facilities in April with the understanding that our contract funds will increase by half of fiscal year 1982's budget figure of $183,000 (BIA's estimate). We learned that there are no funds available at this time.

Mr. KILLS STRAIGHT. In the proposed regulations, I came across one item where the Federal Government wanted to increase their role for the area office and superintendent. Ever since 1971, when we became involved in the whole contract school movement, it has been our position to deal directly and work directly with the central office. Other offices, such as, the Aberdeen and the Albuquerque offices, have always been a hindrance. They are more of a problem than a help.

There is a current discussion going on where they want to realine. We do not want to see a realinement. I personally would like to see them axed, get rid of them. You will be insuring that the taxpayer moneys reach our level—the level for which it was intended and where it is needed.

Approximately $4,000 per student was allocated, yet, by the time the funds trickle down to our level, we receive $1,900 per student at Little Wound school.

The issue that dealt with the cooperative agreement, we felt that for some schools and for other associations it may be all right, but we prefer working directly with contracts. When you have a contract, it is ironclad. As long as we felt there is a need for it and it is written in the contract, we are sure that we are going to receive it.

Heretofore the schools have operated under grants, appropriations, through the band analysis procedures by the Bureau of Indian Affairs. They always have shown a major difference between what we actually see and what has always been requested. Also by the time that we receive it, most of it, as I pointed out earlier, is lost on the way.

Mr. Chairman, I would like to probably comment on more of the specific items. However, I feel that I have spent more than 5 minutes here already and I will turn this over to the next gentleman who is here. We will follow this up, as I said, with a more detailed statement.

Thank you for the opportunity to speak to you.

[Subsequent to the hearing the following information and accompanying resolution were received for the record:]

The Little Wound School Board is a member of the Association of Contract Tribal Schools and it supports the action taken by the ACTS membership. (See accompanying resolution.)

Furthermore, it is my position that additional time is definitely needed to sit down with BIA and congressional officials to study the 638 regulations more thoroughly before moving ahead with any amendments. This consultation must be made now.

It is also my position that: (1) Public Law 95–224 be repealed (2) develop a central office Office of Contract Schools whose sole purpose for existence will be to monitor and work with the 60 or so contract schools throughout the country, and (3) to conduct a study that will be the basis for developing a law that will work only with contract schools. This study must be conducted under your authority with the work done by officials of ACTS and the BIA.

RESOLUTION OF THE ASSOCIATION OF CONTRACT TRIBAL SCHOOLS, INC. TO THE U.S. SENATE SELECT COMMITTEE ON INDIAN AFFAIRS REGARDING PROPOSED CHANGES TO IMPLEMENTING REGULATIONS UNDER PUBLIC LAW 93–638

Whereas:

1. The Association of Contract Tribal Schools, Inc. (ACTS) represents a membership of 31 contract schools operating under Public Law 93–638; and

2. The contract schools are historically the catalyst that brought about the contract process and the Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93–638); and

3. The Bureau of Indian Affairs (BIA) has proposed to revise 25 CFR 271 ff which implement Public Law 93–638; and

4. The BIA has failed to follow present regulations requiring Bureau consultation with tribes and national and regional Indian organizations regarding the need to change such federal regulations; and

5. The BIA is proposing to violate Public Law 93–638 with the erroneous and malicious application of Public Law 95–224, the Federal Grants and Cooperative Agreements Act, which would change the federal relationship from an obligatory contract relationship to a supplemental and discretionary grant relationship; and

6. The proposed changes would, at minimum:

a. Distort the federal treaty obligation to provide essential services to Indian peoples;

b. Extinguish rights, privileges, and protection presently found available under Public Law 93-638 contracting regulations; and

c. Provide Area and Agency administrators with additional power and authority to discourage Indian self-determination, increasing the inherent conflict-of-interest in the Bureau contracting itself to Indian peoples;

d. Diminish present responsibilities of the Bureau toward Indians by terming Bureau programs as assistance to Indians;

e. Eliminate availability of GSA services to Indians without plans to identify resources that are required to fulfill Sec. 106(h) of the Act, i.e., Secretarial Level Funding.

7. There is no requirement under the U.S. Constitution, federal law or regulation demanding such an initiative by the Bureau, and such proposed changes have been arbitrarily accepted by the Bureau; and

8. The Indian Health Service of the Department of Health and Human Services, also required under Sec. 103 of the Act to contract with Indian peoples, has clearly decided not to change to a grant-type relationship; and

9. The proposed changes are poorly written, ambiguous, obtuse, and drafted without regard to the Indian peoples affected. Now, therefore, be it

Resolved, that:

1. The Association of Contract Tribal School, Inc. (ACTS) vehemently opposes the proposed change from contracts to grants, for reasons primarily, but not limited to:

a. Such changes are not required by law, and are in direct violation of the mandate in Public Law 93-638 that the Bureau contract with Indian peoples.

b. The changes reduce tribal initiatives, rights and protections, with increased responsibilities and administrative effort required to meet the grant regulatory requirements.

2. The ACTS, Inc. requests the Congress mandate the BIA implement present regulations under the Act, including the consultation requirements.

3. The ACTS, Inc. requests the Congress forbid the BIA from further developments and implementation of the proposed changes.

4. The ACTS, Inc. requests the Senate authorize and request comments and recommendations on present regulations from Indian tribes and tribal organizations, and national and regional Indian organizations, so that changes can be effected to increase the self-determination potential of Indian peoples.

5. The ACTS, Inc. requests the Congress technically amend Public Law 95-224 to clarify that Public Law 95-224 does not apply to Indian tribes and tribal organizations, and the Indian Self-Determination Act of 1975.

CERTIFICATION

The Board of Directors of ACTS, Inc. was authorized, by a vote of 5 for and 0 against to prepare and present oral and written testimony on Public Law 93-638 regulation changes and the indirect cost problems.

ROGER BORDEAUX, *President.*
JIMMIE C. BEGAY, *Treasurer.*

Dated: August 9, 1982.

Senator DECONCINI. As I said, we will welcome your statement for the record. The record will be available for 30 days to receive additional statements or any additions that anybody would like to submit to us.

Mr. BARNEY. Mr. Chairman, I would like to say a very few words and then I would like to turn the remaining time over to Mr. Bruce Hoffman.

STATEMENT OF BEN BARNEY, ROCK POINT SCHOOL, ROCK POINT, ARIZ.

Mr. BARNEY. Mr. Hoffman and I are both from the same school, the Rock Point School, up near Chinle, Ariz. I would like to suggest that the BIA begin to implement the intent of Public Law 93-638 and that in doing so that it consult with us to speak with us about some of our reactions and some of the problems that we would encounter in making these revisions to the law.

At the same time, they should consider the kind of timeframe they would be going on in coming up with these new regulations.

That is basically what I have in my statement and we will file a statement.[1] I would like to turn the remaining time over to Bruce Hoffman.

Senator DECONCINI. Thank you. We will be happy to receive your statement and place it in the record of this hearing.

[The material follows. Testimony resumes on p. 270.]

---

[1] See also, Appendix, p. 425.

ROCK POINT COMMUNITY SCHOOL
(via) CHINLE, AZ 86503
PHONE (602) 659-4224 [illegible] JUL 15 PM 12:22

July 8, 1982

Senator William Cohen
Senate Select Committee on Indian Affairs
The United States Senate
Room 1251 Dirksen SOB
Washington, DC 20510

ATTENTION: Ms. Jojo Hunt

Dear Senator Cohen:

We would like to extend our sincerest appreciation for your efforts to hold an oversight hearing on the proposed activities of the Bureau of Indian Affairs regarding changes in PL 93-638 regulations, and the continuing indirect cost problems of Indian contractors. Our representatives have reported to us the substance of the government testimony and that of the Indian witnesses. We are impressed at the depth and grasp of the issues that you and Senator DeConcini hold, and your sympathetic understanding of the tribal viewpoints. We hope that you will be able to use your influences to change the direction the Bureau administration is moving in, so that the great gains made by Indian people under the Indian Self-Determination Act will continue, increase, and prevail over bureaucratic self-interests.

We are enclosing at this poin our written testimony regarding the changes in 25 CFR 271, the basic contract/grant regulations. We will shortly submit to ovr written testimony on the indirect cost problem. We hope that this information will be helpful in your analysis of the problems and that important changes can be made to the present contracting regulations, which would improve upon them, and leave them intact.

Again, thank you for your kind invitation to testify, and we will continue to inform your office of developments in Bureau policies and procedures in this area.

Sincerely,

Kim L. Nih, Chairman
Kee PAHE, Vice-Chairman
Tapaha Begay
Tapaha BEGAY, Sec./Treasurer

Harry T. Begay
Harry Tso BEGAY, Member
Frank W. BEGAY, Member
Paul JONES, Member

ROCK POINT COMMUNITY SCHOOL
(via) CHINLE, AZ 86503
PHONE (602) 659-4224

RECEIVED JUL 15 1982
1982 JUL 15 PM 1:22

July 8, 1982

Senator John Melcher
Senate Select Committee on Indian Affairs
Room 253 Russel SOB
Washington, DC 20510

Dear Senator Melcher:

Enclosed please accept a copy of our written testimony, in support of the oral testimony presented by our representative last week at the hearing held on June 30 regarding the changes proposed by the Bureau of Indian Affairs in the implementing regulations of PL 93-638.

As our oral and written testimony reflects, we are completely opposed to the major change from a contract relationship to a grant relationship. We know of no Indian tribe or community that supports such a change. We hope that this written testimony will reflect to you some of the major problems we forsee should this change take place. We ask for your support in attempting to reverse the process that the Bureau's administration has started, and we recommend that changes within the contracting regulations be made to insure that our rights are protected, and our ability to fulfill the self-determination mandate of PL 93-638 is increased.

Thank you for the opportunity to testify before this Committee, and we will attempt to keep your office informed of Bureau policies and procedures that affect Indian people.

Sincerely,

The Rock Point Community School Board

Kim L. Nih
Kim L. NIH, Chairman

Harry T. Begay
Harry Tso BEGAY, Member

Kee Pahe
Kee PAHE, Vice Chairman

Frank W. Begay
Frank W. BEGAY, Member

Tapaha Begay
Tapaha BEGAY, Sec./Treasurer

Paul Jones
Paul JONES, Member

ROCK POINT COMMUNITY SCHOOL
(via) CHINLE, AZ 86503
PHONE (602) 659-4224

1982 JUL 22 AM 10 48

July 15, 1982

Senator William Cohen
Senate Select Committee on Indian Affairs
The United States Senate
Room 1251 Dirksen SOB
Washington, DC 20510

ATTENTION: Ms. Jojo Hunt

Dear Senator Cohen:

Enclosed please find a copy of our written testimony as follow-up to our oral presentation to the Committee on June 30, 1982. This is Part II of that written statement, regarding the indirect cost problem area. (We have previously submitted to the committee our commentary on the proposed revisions in 25 CFR 271 regulations.)

We realize that the whole issue of federal funding of Indian programs is a complex issue. We hope that through continued hearings such as this Committee has held, we can better communicate the realities of the Indian world to the Bureau of Indian Affairs, for the improvement of Indian self-determination.

Thank you for your interest and support of our school and for Indian contractors everywhere.

Sincerely,

THE ROCK POINT COMMUNITY SCHOOL BOARD

Kim L. Nih, Chairman

Harry Tso Begay, Member

Kee Pahe, Vice Chairman

Frank W. Begay, Member

Tapaha Begay, Sec-Treasurer

Paul Jones, Member

ROCK POINT COMMUNITY SCHOOL
(via) CHINLE, AZ 86503
PHONE (602) 659-4224

Testimony of the Rock Point Community School Board to
The Senate Select Committee on Indian Affairs
June 30, 1982, Dirksen Senate Office Building, Washington, DC
Written Testimony as Follow-up to Oral Presentation, June 30, 1982

PART II THE INDIRECT COST PROBLEM / SECRETARIAL LEVEL FUNDING / INDIAN CONTRACT SUPPORT FUND

1. INTRODUCTION: The Bureau of Indian Affairs (BIA) has had recurrent shortfalls in the Contract Support Fund line item, causing concurrent under-recoveries of administrative costs by PL 93-638 Indian contractors who use the indirect cost rate. The BIA was requested by the Congress to insure that this situation be corrected. For FY 83, the projected deficit for ICSF is estimated a $6,000,000.00, four times the FY 82 deficit.

COMMENT: The BIA has failed to implement the funding provisions of PL 93-638, with its failure to fund the administrative costs of contracted operations at 100% of contractor indirect cost rates or lump sum agreements. Secretary Smith admits a shortfall of $1.3 million for FY 80; a shortfall of $1.5 million for FY 81, and a shortfall of some $6.0 million for FY 82. The problem is getting worse. Sec. 106(h) of the Act calls for the funding of a contract operation at the same level of funding that the Bureau would have otherwise operated this program.

Secretary Smith points out in his written testimony to this Committee that there has been significant increases in tribal contracting, and that presently, nearly 50% of BIA service program dollars are contracted for under PL 93-638. But we do not see any significant decrease in the Bureau's administrative budget! One should surmise that from such a dramatic initiative in self-determination, there should be some reduction in the BIA's own administrative costs. However, we see just the opposite happening. Figures have been generated by others (and submitted to this committee in March, 1981) that show BIA administrative budgets rise by 200% over the past four years! Why do BIA administrative costs rise when more and more programs are contracted by Indians?

2. The BIA testified on June 30th that in analyzing its indirect costs, and the amounts requested and alloted to Indian contracts, the BIA estimated indirect cost rate was 10% or 15%, whereas Indian contractors with higher rates were probably overfunded on the Secretarial Level Funding clause of PL 93-638.

COMMENT: We should like to see the figures Mr. Smith uses to come to the conclusion he does. First, there has been no provision for BIA administrative dollars to Indian contractors for Indian administrative costs. All Indian administrative costs have had to be drawn from the Indian Contract Support Fund (ICSF), which was intended to cover only those costs not generally incurred by the BIA at any level of its administration. The BIA has managed to deceive the Congress and Indian peoples that the ICSF was designed to cover all Indian administrative costs, so that no part of BIA administration would need to be ceded to Indian contractors.

Second, by reviewing BIA budget requests to-the Congress, for all areas of operation, we estimate that the BIA overhead rate, if computed per the indirect cost guidelines OASC-10 that Indian contractors are regulated by, the BIA would have an indirect cost rate of over 30%.

Contract schools have repeatedly called for an independent audit of the BIA's expenses and cost allocation plan to determine just what overhead the Bureau pays for to determine what indirect costs are incurred by the Bureau, and to come to an indirect cost ratio for its programs.

3. The BIA has failed to resolve this problem in the past two years, even though extensive data collection and work has gone on by many Indian groups and affected contractors.

COMMENT: Mr. Andrade earlier testified that NCAI has completed an extensive review of the indirect cost problem, had offered its report to the BIA and had never received any feedback on it. Many Navajo contract schools have been dealing with the issues for several years, supplying data and info on contractor costs and BIA administrative costs. Rock Point Community School, in attempting to obtain its FY 82 indirect cost rate, supplied to the BIA extensive documentation as to BIA administration services programs to education (parts of which were supplied by BIA education agency offices.) Mr. Suagee of the BIA met with representatives of some 40 contract schools and tribes in July, 1981, and promised everyone that he would carefully consider our opinions on the issues, and incorporate them into the draft guidelines for lump sums which the BIA was pressing for at that time. None of our input was included in the revisions to be guidelines!! Mr. Curt Nordwall, who became the "primary author" of the guidelines informed a meeting of Navajo contract school personnel that he had never received the questions and information that we school people told him had been submitted to Mr. Suagee.

Mr. Nordwall had only three documents from Navajo schools, after several years of work. (The story goes that Mr. Suagee gave a BIA secretary all of our notes, and she, not knowing what to do with them, disposed of them, unbeknownst to anyone else!)

4. The BIA has accepted a report on the indirect cost problem prepared by the American Indian Law Center (ABQ, NM).

COMMENT: Although a fairly comprehensive report, the AILC report fails in several respects to address the whole problem. Several of these problems were addressed to the AILC panel in March, 1982, at a meeting of BIA, AILC, and Indian contractors. We are offended that the final report ignored some of our concerns.

5. The AILC report suggests throughout that Indians are the cause of the problems of indirect cost under-recoveries and problems with the indirect cost rate.

COMMENT: This slant in the report may have some basis for some tribes, but as a summary conclusion, it is erroneous. Most contractors can manage the rate, if the funds are available. The AILC report finds no statutory restrictions that reduce indirect costs to fixed amounts, or to limited rates. The report notes that these restrictions are developed by eager bureaucrats who go beyond the letter of laws, to reduce federal spending. Such restrictions could also be corrected by the same bureaucrats, if the Congress would coordinate an effort to restrain bureaucrats from doing so. The report recommends that some flexibility be exercised by the Office of the Inspector General (OIG) when applying rates on actual expenditures, and the recording of indirect cost recoveries. Present regulations, such as OASC-10 do allow for multiple rates for those contractors who would otherwise suffer an under-recovery situation on a restricted rate program. However, the OIG responds that they don't want to issue multiple rates, because it increases their audit work (yet such rates would eliminate under-recoveries by tribes).

We at Rock Point have not failed to recover any indirect cost funding from any funding source, except for the BIA! Each year we receive less and less of what our rate requires we recover. FY 81 allowed only 96% funding; FY 82 looks like it will provide only 85% to 92% funding, pending availability of funds. The AILC report indicates that only other funding sources cause under-recoveries; false! It is the BIA that has caused our greatest financial management problems.

6. The AILC report was generated by March, 1982, with its final report form in May, 1982. Mr. Krenzke's cover letter indicates that the BIA has not established a plan for resolving the problems. On June 30, we asked Mr. Krenzke what the plans are. His response was that the BIA would select those recommendations that it wished to implement, and not some of the others.

COMMENT: For its weaknesses, the AILC report does put together some good recommendations. We see the recommendations as an integrated plan. We are suspicious and concerned when we hear that some recommendations will be implemented, and others won't. If past experience is worthwhile, we are fearful that the BIA will take those recommendations that reduce its burdens, and increase those of contractors.

7. PL 95-561 was passed by the Congress to establish a fair and uniform method of distributing BIA Basic Service education appropriations, to both BIA operated and contracted programs. The law calls for a formula for the administration of contracted operations.

COMMENT: We understand the language of PL 95-561 to mandate the BIA to do something about formulizing administrative costs for contract schools. This has not been done, and we understand not even started. The BIA appears to feel that such a formula is an option to them.

We believe that the BIA must be responsive to our public laws. There is a demand for an administrative formula. We fail to understand why the BIA does not perform its obligations.

8. The AILC report suggests that the BIA develop a statistical method for determining its own overhead costs.

COMMENT: We agree that this would be one concrete and prudent way to proceed, in order to concretely determine what BIA overhead costs for education are. However, we feel the report falls well short of requiring an outside agency to do this for the BIA. We cannot rely on the BIA to do it properly. Our request to this Committee is that an agency outside of the BIA perform the mechanics of determining what would otherwise be called the BIA's indirect cost ratio. If no outside agency (such as the G.A.O.) can be found to do so, the BIA should be directed to set up a task force with equal representation of government employees and contract school/tribal contractors to sit with the BIA and to review their work and progress. We would like to ask this Committee to direct the BIA in such a way that objectivity can be included in the process, and that this Committee review the final results with Indian contractors.

9. The BIA has failed to fund contractors at 100% of their established needs.

COMMENT: It is unnecessary for the BIA to fall short on Indian Contract Support Funds. We have been told by BIA central office staff of how someone "forgot" to budget $7.5 million for OIG audit costs one year. In fact, former OMB Director James McIntyre directed to BIA to find the money it needed in FY 78 to avoid a shortfall in the ICSF by locating savings within its own administrative appropriations. The Bureau succeeded in so finding the money.

We pointed out and submitted to the AILC a copy of that memorandum from Mr. McIntyre for inclusion in the report-- but the AILC team declined twice to include this "relief mechanism" in their report.

10. The AILC report recommends that the BIA discover its overhead cost ratio by the beginning of FY 83.

COMMENT: The suggestion is incredible! We already have reliable data for the amount of time, effort and resources it takes to develop an indirect cost proposal, and to identify costs at the local level. The Bureau's task is all that much greater. The BIA has had recurrent problems in dealing with direct costs under the PL 95-561 formula. We see a start-up date of the BIA plan by Oct. 1, 1982 as unfeasible; if rushed, the BIA will perform this critical operation poorly.

In conclusion, we would like to once again extend our sincere appreciation to the members of this committee for their concern and care for Indian education and Indian self-determination. We believe that PL 93-638 has been the best law for Indian peoples, and we hope that the Congress will help provide the encouragement to the administration to insure that this law is implemented and fulfilled in the near future.

Testimony of the Rock Point Community School Board to
The Senate Select Committee on Indian Affairs
June 30, 1982, Dirksen Senate Office Building, Washington, DC
Written Testimony as Follow-up to Oral Presentation, June 30, 1982

Part 1 PROPOSED CHANGES IN 25 CFR 271-277, Regulations Implementing PL 93-638, The Indian Self-Determination and Education Assistance Act of 1975.

INTRODUCTION: The Bureau of Indian Affairs (BIA) is proposing major changes in the federal regulations affecting Indian Self-Determination, by changing the relationship between the government and Indian contractors from a contract relationship to a grant relationship.

1. The BIA proposes to revise 25 CFR 271 ff to bring the BIA into alignment with PL 95-224, the Federal Grants and Cooperative Agreements Act of 1978, and to increase the self-determination potential of Indians to manage their own programs.

COMMENT: Nothing appears to be farther from the truth! We believe that the proposed changes are a part of the BIA's intent to diminish federal obligations to fulfill trust and treaty responsibilities. This would appear to be a part of a greater plan to terminate services to Indians. The BIA's earlier proposed CTGP (Consolidated Tribal Grant Programs) plans were also designed to reduce Indian initiatives, and the CTGP was roundly rejected by tribes everywhere. The BIA proposed Area office re-alignment also is structured to fragment tribal unity.

In specific, we point out the following:

a. Substantive rights and obligations under PL 93-638 are being watered down, if not eliminated. PL 93-638 directed the Secretary of the Interior (as well as the Secretary of HEW, or Health and Human Services) to contract to Indian tribes and communities for the provision by Indians of those services that the federal is obligated to perform. The Congress had considered both contracts and grants at the passage of the Act, and knowingly committed the government to contracting with Indian peoples. The Secretary of HHS has not proposed to revise its regulations implementing Sec. 103 of the Act to conform with PL 95-224. We see the BIA initiative to do so as a means to reduce its responsibilities to Indians.

b. Neither contract or grant as defined by PL 95-224, and as proposed in the revision applies to the unique relationship between the government and Indians. We agree with the BIA that the government is not buying services when contracting with tribes/organizations; we disagree strongly with the concept that the government is simply providing 'financial assistance' to tribes in the first place: the government is obliged to provide certain services; PL 93-638 provided a mechanism for Indians to fulfill this very federal responsibility. By proposing a grant relationship, the BIA proposes to dramatically change the relationship of trust and treaty responsibilities to that of some sort of discretionary 'financial assistance' as defined under PL 95-224. It is a proposed 'sleight of hand,' at it essence, to change this historical relationship.

2. The Bureau proposes a new policy statement (271.4(h)), that in any conflict between these or other regulations, the Act (93-638) shall prevail.

COMMENT: We agree with this policy statement. However, we see an immediate conflict with these proposed revisions to a grant relationship, that it is in direct conflict with the Congressional mandate under PL 93-638 to contract for BIA programs, rather than to establish a grant relationship! They change the Act!

3. The BIA proposes to utilize OMB Circulars, A-102 and A-87, as the functional administrative regulations for implementing this new relationship.

COMMENT: The Act (PL 93-638) instructs the BIA to publish for review, request comments and to consult with Indian peoples prior to amending requirements under the Act. By placing substantial authority in general federal guidelines, the BIA diminishes the unique relationship between Indians and the government. OMB circulars may be changed, without notice and without consultation, at any time. This effectively by-passes Indian input and responsibility for self-determination. The Act does not require 'uniformity with other federal agencies,' as suggested by the Bureau. This proposed change would simply reduce present protection and flexibility in favor of greater BIA control and rigidness. There are numerous examples of this loss: loss of Part 14H-70 contracting requirements, which provide for the use of GSA services and motor pool; increased effort by tribes to learn other federal directives that would substitute for already known and workable directives under present regulations; directives in OMB circulars that are not otherwise applicable to BIA-operated schools.

4. The Bureau amends the declination criteria in several important aspects. Funding limitations are now to be considered matters for declination.

COMMENT: We agree with the Bureau that funding limitations should be a matter to be resolved under the declination proceedings. This is one change that we feel will be helpful for Indian contractors/grantees in determining the availability of funds (i.e., on a nation-wide scale) for Indian programs, and the limits of funds can now be examined under the declination procedures, subject to the hearings and appeals procedures authorized by the Act.

5. The BIA proposes to amend flexible regulations re: personnel management, property management and bookkeeping procedures.

COMMENT: The revision proposes to eliminate present protection and opportunity for tribes and tribal organizations to establish themselves through the self-determination process. Present reg. 271.15(c)(5) insures that if a personnel system is not in place when a contracted program begins, the contractor can agree (MUST AGREE) to establish one during the contract period, meeting certain acceptable standards. Revised 271.20 does not provide for this start-up process for Indian organizations. An organization must have its personnel system in place before even receiving a grant! It increases the burden of the organization to perform even prior to the receipt of funds.

Similarly, present reg. 271.15(c)(6) allows for organizations to "agree(d) to establish and maintain a property management system" to protect government property; the revision does not allow an recipient any space to establish itself: it must already be established.

Finally, rev. reg. S 271.20(c)(2) states that the BIA must demonstrate that the tribal organization which will undertake a grant "does not have an adequate accounting and bookkeeping system." This dissolves the strength of the original regulation which states:

> ". . . It must be demonstrated by the Bureau that the tribal organization does not have or cannot set in place, using contract funds, an accounting and bookkeeping system which will be adequate." (emphasis added)

6. The BIA proposes to eliminate protective language that limits BIA demands for additional information or "other components" not specifically addressed in the regulations.

COMMENT: Present reg. 271.15(c)(6)(D)(ii) clearly states that no other components can be used by the BIA for declination; the revised grant reg. simply eliminates this clause, leaving the door wide open for the BIA to create new issues for declination! Some schools have been told they must comply with BIA educational standards, which PL 95-561 not only does not require but clearly allows schools to establish their own standards.

7. The Bureau eliminates the requirements for an application under PL 93-638 by providing in Part 276 the use of standard forms for federal assistance.

COMMENT: Present regs under Part 271 include all details that will be required, with the stipulation that "No further detail is, or shall be, required." This language has been deleted. Indian contractors have had clear directions. Now, under the proposed grant regs, this simplicity is lost. Part 276.16 instructs applicants to use the "short form" application, unless in the judgment of the grants officer, "supplementary pages are required for improved program or fiscal accountability." This leaves a great deal of discretion in the hands on lower level bureaucrats who may not be experienced in operating unique and individual Indian programs, to demand arbitrarily additional information, perhaps, to meet BIA criteria that are not found in the regulations, but found elsewhere in the BIA system, such as in a Manual or memo/instructions. It is unclear if there are any rights to hearing or appeal should such anticipated problems occur.

8. The BIA proposes in Rev. Sec. 271.41 to add additional requirements for grant management than those found in Part 276 of these implementing regulations.

COMMENT: Under the present contract system and implementing regulations (such as present Part 276 and 41 CFR 14H-70) contractors have clearly defined responsibilities and the BIA has limits on its authority. The revised regs give the BIA additional authority to impose special and more stringent grant conditions when grantees have violated grant conditions or has a management system which does not meet regulatory standards. Although subject to the appeal procedures, time delays and money transfer delays will ensue under BIA restrictions further discouraging Indian initiatives. If a tribe is not given the opportunity to establish the management system during the grant period, these regs will insure either the impossibility of tribes of establishing the management systems as required, or will delay administrative processes to the point of total frustration.

9. The Bureau proposes to add "special conditions" under a cooperative agreement, rev. Sec. 271.23.

COMMENT: While PL 95-224 allows for cooperative agreements under certain conditions, the BIA appears to have widened the scope of that provision by not indicating it obligation to prove with substantial evidence" that such special conditions do, in fact, exist. Presently, under the declination criteria, the BIA has the burden of proof. This change would further reduce a tribal initiative for self-determination wherein the government could issue a cooperative agreement, when in fact the tribal agency had applied for a grant instead! There is wide room for bureaucratic manipulation. Again, the right to appeal on a negative BIA decision here is unclear.

10. The Bureau proposes to modify the language of present reg. 271.54 (Contract Funds) with rev. 271.43 (Direct and Indirect Costs).

COMMENT: The new language is unclear in its specific intent, in view of the BIA's consideration of eliminating completely the distinction between direct costs and indirect costs funding, one prime recommendation in the American Indian Law Center Report of May, 1982. That reports suggests that DC and IC be collapsed. We strongly recommend against such a collapse of distinct funds, esp. since the government operates its own schools with distinct and separate funding. In addition, the proposed language deletes regulatory protection presently found in the regs, when it eliminates the following provision. Present reg 271.54(a) states that direct costs supplied to an organization for planning, administering, and evaluating "shall not be used to reduce indirect costs otherwise allowable to a tribal organizations." By deleting that language, and by accepting and initiating a plan to eliminate the difference between direct costs and a separately identifiable indirect cost line item in the Contract Support Fund, the Bureau will be able to reduce funding to levels that would discourage any organization from attempting self-determination. All administrative service costs will become direct costs, and the Secretarial Level Funding provision of PL 93-638 (S 106(h)) will be again be unrealized.

11. The Bureau proposes a new policy regulation, rev. 271.4, indicating that they will provide for both direct and indirect costs.

COMMENT: Although some may say that this is 'noble' of the BIA to finally address the necessity for the government to provide for both program (direct) costs and administrative overhead (indirect costs), this policy appears to be in conflict with its own report on the matter, also under review by this panel. The AILC report indicates that the notion of indirect costs should be eliminated due to confusion. The Bureau is sending Indian peoples confusing signals on what its policies are. It can only lead to more suspicion and confusion on the parts of tribes to understand what the government expects, when attempting to function under PL 93-638. It appears that Indians are challenged not only to perform well under a contract or grant, but also to figure out what the BIA is anticipating.

12. The Bureau proposes several regulations with no specific criteria for BIA employees to use in making positive/negative determinations in grant issuance, special conditions, additional information needed. Specifically, the "New School Starts" section (S 271.72) is loaded with such statements.

COMMENTS: The BIA fails to identify any criteria for use as basis for declination of a new school start or program expansion. Such ambiguity is found elsewhere in the revisions. Some examples:

a. S 271.23(a) "Under specified circumstances the Commissioner may prescribe the award of a cooperative agreement rather than a grant...." (No "specified circumstances" are indicated.)

b. § 271.23(b) "The Commissioner may order the use of a cooperative agreement when, in his judgment, performance would be improved by use of a cooperative agreement...." (No basis for judgment indicated.)

c. § 271.41(a) "Special grant conditions more restrictive than those required by Part 276 may be imposed...." (Should be specified, for appeal purposes or declination issues.)

d. § 271.73(b) "Proposed programs and program changes shall be of sufficient quality to offer promise of providing educational benefits...." (The meaning of this is left to the discretion of Agency Superintendents or Education Line Officers.)

e. § 271.73(b)(4) "Whether the size of the student population to be served appears to be sufficiently large and stable...." (Without figures or specifics, we ask: In whose eyes? The BIA or the local community?)

f. §271.73(b)(4) "Whether there are other adequate education alternatives currently available to the students to be served...." (Adequate can certainly mean different things to different people. Contract schools respond to community initiatives; no other school could be considered adequate if Indians want to have their children attend a community-controlled contract school.)

13. The Bureau proposes to eliminate the protection as found under federal contracting law as much as in 14H-70, and the loss of GSA services.

COMMENT: Presently, Indian contractors have, as a last resort, the procedures and processes found under federal contracting laws, specifically 41 CFR 14H-70, and the Contracts Dispute Act of 1978. If a contractor feels that after hearings and appeals (administrative relief) nothing has changed to the correct errors or wrongs to the contractor, the Indian organization can seek relief under the Contracts Dispute Act. Unfortunately, we know of no such protection provided by the Congress for relief under grants. In addition, the loss of GSA services, including both motor pool and other services, will cripple many, if not all contractors presently relying on such services. Rock Point estimates that to replace the GSA busses it uses to provide by day school transportation, the Bureau would need to fund the transportation segment of the "funding formula" nearly four times higher than the level it presently receives for transportation. Should the Bureau succeed to eliminate GSA services, and not provide transportation funds to meet basic day school needs, Rock Point may have to cut educational services below basic levels, or close the school completely. Rock Point, as well as other day schools, feel that the Secretarial Funding Level as demanded by Sec. 106(h) of the Act requires the government to either provide the subsidized GSA services OR funding to meet the need. With the failure to provide either the GSA services or adequate funding, the meaning and concept of community controlled Indian schools will vanish!

14. The Bureau recommends to increase the authority of Area Directors and Agency Superintendents under the proposed grant system.

COMMENT: Although it would appear that increasing the authority of local BIA administrators might suggest a better communication between grantee and the BIA, the reality of the system clearly would not provide for this benefit.

a. There is a conflict of interest in BIA employees contracting out to Indian organizations its programs, when the loss of jobs, funds, power and influence will be realized. This has been highlighted in several G.A.O. audit reports on the BIA's implementation of PL 93-638. The reader should confer the following:

-"The Indian Self Determination Act-- Many Obstacles Remain" (3/1/78)

-"Still No Progress in Implementing Controls Over Contracts and Grants With Indians" (9/10/81)

Briefly, we quote from this latter report the following:

> The situation (implementing PL 93-638) presents a dilemma or inherent conflict for BIA employees who, if they are successful in implementing self-determination, may well be eliminating their own jobs. Therefore, it is not in the BIA employees' best interest to encourage tribes to use self-determination contracts since by doing so they may be putting themselves out of a job. (9/10/81, p. 27)

We, at the local level, therefore see that in providing Agency and Area line officers with additional authority to decline grants, and to use the ambiguities in regulatory language as noted above at their discretion, tribal organizations will undoubtedly continue to suffer from the Bureau's reluctance to "cut itself off." The G.A.O. had recommended that a separate office be established to assist tribes in taking over Bureau programs, because Bureau officials had continued to do such a poor job in contracting itself out in the first place.

b. The Bureau is presently not staffed or trained to handle the committements and responsibilities demanded by PL 93-638 and its regulations under the present system. This is not only reflected in the experience of many Indian contractors, as testimony to this committee has indicated, but also in the G.A.O. reports listed above, and additionally in the Bureau's "Indirect Cost Report" prepared by the American Indian Law Center (May, 1981). There were at least nine specific recommendations in that report that the BIA get itself trained to provide accurate information, technical assistance, and to clarify the mess that has developed over indirect costs (see the second part of this testimony, following.) Even though the present regs have been operative for more than six years, the Bureau has not developed the expertise to do the job right. Many tribes organizations are reluctant to request BIA technical assistance, because of the ineptness, inadequacy, and erroneous advice that comes from BIA field and central office staff. It is amusing, and at the same time discouraging to read of the BIA's pride in now offering pre-application TA under these proposed grant regs, when their performance has been so inadequate in the past.

Should the BIA be allowed to implement these grant regulations, we predict the BIA will proliferate its personnel and resources to meet these additional administrative needs within itself, absorbing funds earmarked for Indians, rather than making them available for additional contract support funding or for implementing new Indian programs.

15. The Bureau recommends that OMB C. A-102 Attachment be utilized in grant closeout procedures.

COMMENT: It is unclear what the relationship of A-102 is with these proposed regs. Sec. 271.54 and other regs provide clear procedures for the withholding of funds and re-assumption of payments. If literally followed, A-102 would diminish the protection found in the 271 regs. Inexperienced and/or uneducated federal employees may follow the wrong procedures; at the same time, A-102 does not provide for the hearings and appeals found in 271. This would have to be cleared up.

16. The Bureau proposes to increase the BIA review authority on grant continuation modification, per. Sec. 271.22.

COMMENT: Many Indian contractors apply for multi-year grants, under the present system, in order to reduce the administrative burdens associated with re-contracting. Although the revision does allow for grants for up to three years, the BIA is proposing to add additional review authority not presently found under the present system. Presently, if a contract is awarded for more than one year, the succeeding year modifications are reviewed for budget considerations and changes of scope of the programs contracted. If there are no changes in scope, then budget modifications are the only aspect reviewed.

However, under this grants system, revised reg. 271.22 states that the continuation proposal will be "reviewed in the same manner as initial applications and evaluated according to the same criteria." This is onerous. It makes a tremendous difference at the program implementation level to negotiate only a budget modification, as compared to having your program questioned at every aspect as under a new contract application. The government already retains authority to terminate and/or reassume a contracted program for sufficient reason, such as malfeasance on the part of the contractor. There is no need for additional annual authority to evaluate a continuation modification. This can only discourage self-determination. This reflects to us the BIA's desire not to contract/grant out its programs to Indians; it reinforces our convication that the BIA wants to control.

17. The Bureau plans to use grants rather than contracts.

COMMENT: The implication found in between the lines of the new regs, and in using OMB Circulars for grants, is that grants under PL 93-638 could become discretionary. If the BIA did not have enough increased control over self-determination initiatives, the use of a grant mechanism increases that sense of BIA discretionary powers. § 271.22 gives the BIA additional power to not continue a grant that has been awarded for three years with additional review and evaluation procedures not presently allowed for under the contract relationship. Continuation grants could become discretionary.

18. The Bureau, in the written prepared testimony of Ass't. Secretary Smith, states that "Consultation meetings were held with tribal leaders."

COMMENT: Although this may be factually true that meetings were held, we understand that the meaning of reg. §271.3 has not been adhered to by the BIA. §271.3(a) states that the Secretary shall "Consult with Indian tribes and national and regional Indian organizations to the extent practicable about the need for revision or amendment and consider their views in preparing the proposed revision of amendment." (emphasis added)

We are a member of a regional Indian organization (The Association of Navajo Community Controlled School Boards) and a national Indian organization (The Association of Contract Tribals Schools/ACTS), and we have not been consulted. The Navajo Tribe has testified that it has not been effectively consulted. We are asked to comment, but cannot obtain copies of the revisions from Mr. Heald's office. Consultation becomes nothing more than a superficial notification of what the Bureau has already intended to do, no matter what Indian peoples think and desire.

We know of no Tribe or Indian organization or contract school that supports this proposed change from contracts to grants. In meeting with other contract school boards and officials, the opinion is virtually universally against these changes. We ask that this Committee assist Indian peoples in returning the Bureau to the essentials of PL 93-638 and Indian Self-Determination. (We do note that Secretary Smith did not testify that Indian peoples wanted these changes; he argued that another act, PL 95-224 was forcing the BIA to do so!!) As Secretary Smith has testified, more Indian tribes and organization are attempting self-determination, and we know the rules and what is expected. Making such a massive negative change at this time would discourage further contracting and self-determination. We request this Committee to require of the Bureau effective consultation with Indian groups who would be affected by these changes, and to listen to our concerns, and not adopt a grant relationship with the First Americans.

Thank you for your attention and concern with these issues.

STATEMENT OF BRUCE HOFFMAN, ROCK POINT SCHOOL, ROCK POINT, ARIZ.

Mr. HOFFMAN. Thank you, Senator.

Senator, this morning we heard extensively from the Bureau on their position on things, but we do not find the Bureau present here right now to hear us. We are kind of disappointed with that. It reflects a lack of consideration of our points of view.

Senator DECONCINI. Is there anyone here from the Bureau?

[No response.]

Senator DECONCINI. Thank you. It is a good point. I assure you that they are going to hear from us and they will have a copy of this testimony sent to them.

Mr. HOFFMAN. Thank you, Senator.

We heard that one of the big issues is the lack of GSA services available to us under the grant system. That is a big problem but it is not the only problem.

There are substantial other problems such as the loss of protection and rights under the new grant regulations. For example, presently—a contractor can establish a management system for personnel and finances during the contract period. Under the proposed regulations, you would have to have them established before you take on a grant. That is impossible for your small school when you are trying to self-determine.

The present regulations set clear limits as to what the Bureau can demand as far as information is concerned. The new regulations say that the Bureau can ask for any kinds of information at any time. That would definitely hold up the proceedings of getting contracts or grants to tribal organizations.

The BIA proposes using OMB circulars which can be amended at any time by OMB without going through a review process, that is demanded by the act itself.

The present contract regulations provide specific criteria that contractors must put in for applying specific criteria which the Bureau can use for declining a contract.

Under the new grant procedures, specificity is lost and we wind up with statements such as, supplemental pages can be requested. If adequate protection is found of Government resources, then that is the case.

If things appear to be adequate on the contractor's behalf, then that is it. All these are vague and give much more control to the Bureau in determining what they feel the Indians should have.

The BIA is going to give additional authority to the area director and the superintendents for determining whether or not a grant is appropriate or not. This is definitely in conflict with the GAO audit report which indicated that the BIA is reluctant to contract out its programs because of conflict of interest. Giving more power to the area director is going to increase that conflict. He does not want to give up his staff, his programs, his power and authority, but yet the grant is giving more power to him to do so.

In terms of the indirect cost problem, the Bureau admitted that they have contracted out about 50 percent of their programs. If that is true, why has not their administrative cost gone down by, say, close to 50 percent. It has not. In fact, over the last 4 years, it increased 200 percent.

The BIA estimates its own indirect cost rate, or its own overhead, to be around 10 or 15 percent, as Secretary Smith suggested this morning. Our analysis shows their rate to be over 30 percent, just by using BIA appropriation data.

Senator DECONCINI. Excuse me, Mr. Hoffman. I am reluctant to interrupt you but there is a vote on the floor now and they have just signaled us for the last few minutes of that vote. I am going to have to leave, but because we are almost finished today, I am going to ask John Mulkey, my staff assistant on the committee, to hear the balance of your testimony and also the testimony from Dr. Berlin. I also have a number of statements that without objection will appear in the record, so please continue. Mr. Mulkey will stay here.

Ms. ZION. Senator, one question I would ask since I think a number of tribes and contractors have not yet even received the latest draft of the "638" regulations, I would request the committee to keep the record open long enough so that that draft can be gotten out to them and they can have a chance to look at it and to comment. I also would appreciate it if the committee could direct the Bureau to disseminate that draft and not wait until it is published in the Federal Register, which is what they are telling us they are going to do.

Senator DECONCINI. We will attempt to do that. Are you suggesting that 30 days is not long enough for the record?

Ms. ZION. I would go by what the panel has to say.

Mr. HOFFMAN. I would suggest 45 days.

Senator DECONCINI. We cannot make them but we will urge them along and we will take your suggestion and leave the record open for 45 days.

Thank you.

Mr. HOFFMAN. Thank you, Senator.

I just wanted to note that the AILC report, which has been extensively discussed, we asked Mr. Krenzke this morning before the hearing what his plan of operation is going to be and he indicated that he is going to select certain recommendations and not other recommendations. I think that is inappropriate since the report interrelates all recommendations. You cannot take some and not the others, we do not know what the Bureau's intent is there.

The AILC report suggests that other Federal agencies are the cause of contract schools underrecovering. It is not our experience with other agencies. Every agency has paid 100 percent except the BIA. I think it is time that the BIA own up to its responsibility.

The AILC report also suggests that the problem has been caused by Indians, and we do not think that is true. We think it has been caused by Bureau ineptness.

For example, Mr. Zweige admitted he forgot $7.5 million in an appropriation request. Well, that is a lot of money to forget and blame us for not having enough money.

Public Law 95-561 orders the Bureau to establish a funding formula for overhead of contract operations. Secretary Smith's written testimony says that is an idea of the contract schools. Secretary Smith might well read the law.

The AILC report suggests a statistical method of determining the Bureau's overhead expenses. Well, that is a good idea, but we cannot trust the Bureau to do that itself. It needs either GAO, an outside agency, substantial oversight of this committee and other committees, and Indian input.

The Bureau has presently a mechanism to prevent indirect cost shortfalls for contractors. In 1978, OMB Director McIntyre ordered the Bureau to make up the shortfall out of its own money. The Bureau can do that this year, and it has not. It could have done it in past years, and it did not.

I would like to conclude with perhaps a ridicule, but if contractors, such as our school and other tribes, are to operate at the level of competency that the BIA is operating, we would be closed down and our contracts would be taken away. We ask this committee to give as much review of the Bureau's activities as they give of ours.

Thank you.

Mr. MULKEY [acting chairman]. Thank you.

Mr. Berlin?

STATEMENT OF WILLIAM BERLIN, EXECUTIVE DIRECTOR, ALAMO NAVAJO SCHOOL BOARD, INC., MAGDALENA, N. MEX.

Mr. BERLIN. I am Bill Berlin and I am executive director for the Alamo Navajo School Board. I am a member of the same association as these other schools that have preceded me.

I appreciate the opportunity to present this testimony and we have presented our written testimony for your consideration.

Mr. MULKEY. We have received your written testimony and it will be referred to the committee for inclusion in the record of this hearing.

Mr. BERLIN. I will conclude today's remarks for this panel. I would like to touch upon a few points that I do not believe have been mentioned in the course of the day, or if so, were missed by me and I apologize for reiterating them.

We do concur with most of the points that have been made with regard to the decrease in funds, the lack of opportunity to plan, the lack of opportunity to modify, the definitional problems, this long litany of problems that have been enumerated here.

In addition to those, I would suggest that one of the problems that has not been mentioned that the negotiations for the administrative overhead lump sums that many school contractors use, rather than having an indirect cost rate, are a very expensive, protracted, and subjective process.

An example, in fiscal year 1981, our first contact with the contracting officer was made in August, our final negotiation was not concluded until February of the following calendar year, and at our best estimate, at a cost of approximately $21,000.

The past year, our latest negotiation, including four roundtrips from Alamo to Gallup, and the associated costs, we estimate at $5,600, all these funds could be used to defray much more needed expenses.

A second point I believe that has not been dwelt upon is the results of the wrong interpretations. Now, the wrong interpretations, the definitional problems, have been mentioned at some length, but little has been said about the results. Recalling the past year, because people have ill-defined indirect costs, we have had innumerable meetings at a significant cost to the Bureau and to the contract schools in trying to resolve these definitional problems.

Mr. Zweige came more than one time to New Mexico and Arizona to discuss these issues and attempt to bring these problems into focus. Our association has spent, staff members have spent, endless hours trying to get together over long distances as frequently as possible. The costs here have been inestimable and it is because of the improper definitional problems that have arisen.

My third point that I believe has not been addressed is the lack of policy and direction that would have resolved this at the beginning. As we heard this morning, there have been some attempts made to think about policy and direction, but as the status with the GSA vehicles, they are still working on it.

I have been involved in indirect cost problems since my advent into Indian education in 1973 and have struggled since 1977 at all levels, including the central office level. So these problems are not new and they have been exacerbated rather than ameliorated over these past years, and I fear that much of what is projected may well contribute to more of the same because and if, as some of the gentlemen from the Bureau testified, they do implement some of the recommendations from the recent study conducted by the American Indian Law Center, they are merely substituting another ratio for an old ratio. The problems are with ratios. You cannot project adequately on the basis of a variable rate what your funding needs are going to be, so we will be facing the same problems down the road with this system as we face with the current system of the indirect cost rates.

These are essentially the points I feel were not touched. I would like to voice our recommendations for the committee's consideration. It is our belief that the Office of the Assistant Secretary for Indian Affairs should be instructed to include in the proposed regulatory revision to Public Law 93–638 the proviso that contract schools and Bureau of Indian Affairs educational administrative costs be treated separately in budget requests to the Interior Appropriation Committee in accordance with the conference report language that was created last November 5.

We further recommend that to insure that such funding is stipulated therein to be allocated to eligible schools that a formula be developed as mandated in Public Law 95–561, at section 1128(A)(2)(d).

We thank you for your patience.

Mr. MULKEY. Thank you, Mr. Berlin. Your prepared statement will be included in the record at this point.

[The statement follows. Testimony resumes on p. 298.]

Alamo Navajo School Board, Inc.
P.O. BOX 907
MAGDALENA, NEW MEXICO 87825
(505) 854-2543

STATEMENT OF
DR. WILLIAM BERLIN, EXECUTIVE DIRECTOR
ALAMO NAVAJO SCHOOL BOARD INCORPORATED
BEFORE THE
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
REGARDING INDIRECT COSTS
ADMINISTERED UNDER PUBLIC LAW 93-638
30 JUNE 1982

Mr. Chairman, we appreciate this opportunity to appear before the Senate Select Committee on Indian Affairs. This statement is on behalf of the Alamo Navajo School Board, Inc., a not-for-profit organization chartered by the Navajo Nation and by the State of New Mexico for the purpose of operating a K-12 day school on the Alamo Navajo Reservation. In existence only since October 1979, the school currently enrolls 304 students, including preschool.

My name is Bill Berlin. I am Executive Director for ANSB. I wish to comment on the problems that "contract schools" encounter in obtaining administrative overhead costs through the Contract Support Fund line item of the Bureau Of Indian Affairs budget. These administrative overhead costs are incurred in the operation of any school program, and the problems encountered here are distinct from problems tribal governments experience with indirect cost recovery. My statement supports the intent of Congress in its passage of Public Law 95-561, the Education Amendments of 1978, specifically Section 1128, by recommending that the Indian School Equalization Formula (ISEF) include and authorize for appropriation the administrative costs necessary to adequate operation of a school through a PL 93-638 contract. This would be as mandated in Section 1128(a)(2)(D) of the Act and as recommended subsequent to analysis by the National Conference of State Legislatures -- Education Commission of the States, the organization that developed the ISEF under contract to the Bureau Of Indian Affairs during 1978.

Rather than providing funds to underwrite administrative overhead costs through that formula, as Congress intended, the Bureau adopted Contract Support Funds as a budget line item included in the yearly appropriation request beginning with fiscal year 1976, as tribes and tribal organizations began contracting BIA programs in increasing numbers after the passage of Public Law 93-638. Resulting from this decision have been the many problems encountered by contractors attempting to recover administrative overhead costs through Contract Support Fund allocations. In the absence of a precise allotment formula, as mandated by the Congress in the 1978 passage of Public Law 95-561, contract schools cannot be assured, at the beginning of the school year or of the fiscal year, of an exact amount for overhead in that fiscal year even after concluding negotiations with the Bureau's Contracting Officer. As the equivalent of a Local Education Agency (LEA) dependent entirely upon PL 93-638 contracts for its existence, a contract school's financial stability and possible continuance is therefore jeopardized each year.

The sixty contract schools now in existence nationwide undoubtedly share a similar predicament, such that the following nine items, agreed upon as significant problems at a recent convocation of Association of Navajo Community Controlled School Boards, are advanced in support of this contention. The following all pertain to difficulties experienced in receiving funds through the Contract Support Fund line item in amounts agreed upon through negotiations with Bureau representatives. These nine impediments to effective school operations are as follows:

1. Alamo Navajo Community School has experienced a yearly decrease in Contract Support Fund allocations. If the recent directive to Area Offices from the Deputy Assistant Secretary of Indian Affairs - Operations is carried out as stated in Attachment A, we will have fewer dollars for administrative overhead costs for FY 1982 than in FY 1980, the first year of our contract -- this being in contrast to the school's enrollment doubling during these three years of operation. For FY 1980, ANSB received 96 percent of the negotiated overhead amount. This amount (4 percent less than that awarded) then became the FY 1981 base, from which negotiations were then initiated. The FY 1981 appropriation shortfall further reduced the amount of ANSB overhead costs actually underwritten to 90 percent of the negotiated figure. Similarly, for this fiscal year, the base for negotiation purposes has been computed from the actual amount of administrative cost allocation received for FY 1981. It is extremely difficult to administer programs when, after reaching agreement with the Contracting Officer on an amount equal to the FY 1981 figure (subject to availability of appropriated funds) to be notified in the third Quarter of FY 1982 that we must absorb an additional 15 percent cut from the negotiated base as cumulatively reduced. (Reference Attachment B: Contract Support Fund - FY 1976 - FY 1982 regarding the Bureau of Indian Affair's increasing difficulty in requesting adequate amounts for indirect costs associated with Public Law 93-638 Contracts.

2. Planning for an adequate administrative support structure at the beginning of the school year, without advanced knowledge of the amount of money available for this function. Lack of adequate planning and administrative stability jeopardize the school's ability to retain quality personnel and to operate educational programs of satisfactory quality. This was not the intent of Congress as expressed in Section 1128 (a)(2)(D) of Public Law 95-561, where it is stated that...

> The Secretary shall establish, by regulation adopted in accordance with section 1138, a formula for determining the minimum annual amount of funds necessary to sustain each Bureau or contract school. In establishing such formula, the Secretary shall consider...(2)(D) overhead costs associated with administering contracted education functions....

Yet contract schools are forced to wait, often until the end of the First Quarter of the fiscal year before the Bureau makes Contract Support Fund allocation information available, and only then do negotiations for specific amounts begin with the Area Offices' Contracting Officer. For example, as a result of these yearly negotiations, Alamo Navajo School Board has had to undertake significant administrative staff reductions midway through the school year, with predictably adverse results for the academic program --

those of declining staff and student morale and motivation, and, therefore, a questioning of administrative competence by community parents and members.

3. Negotiations for determining the amounts for administrative overhead costs to be funded from the Contract Support Fund line item for PL 93-638 contracts have proved to be very expensive, protracted, and subjective. This situation reflects the need for an allotment formula "...for overhead costs associated with administering contracted education functions..." as referenced in #2 above. A precise allotment formula would eliminate the subjectivity of the Bureau's officials insofar as determining which items of educational administrative overhead warrant inclusion in a PL 93-638 contract.

As an example of the costly, protracted procedures encountered, FY 1981 negotiations for ANSB were not completed until February, 1982 -- fully eight months after the initial contact with the Contracting Officer, and at an approximate cost of $21,000.00 to the school board. For FY 1982, including four roundtrips from the Alamo Reservation to the Gallup Area Office, a distance of 470 miles requiring over eight hours driving time, our administrative overhead cost negotiation was concluded at a cost of approximately $5,600 and at a level of $25,000 less than for FY 1981 -- but with an assurance to restore the funding to a 100 per cent level should such amounts be available after all contracts were finalized during the year. (Reference Attachment C which is an agreement between the School Board and the Area Office Contracts Officer for fiscal year 1982, depicting the manner in which the Bureau enters into such agreements.)

Further, despite having written to the Bureau's Deputy Assistant Secretary for Operations on May 24 regarding his April announcement of a FY 1982 Contract Support Fund shortfall, we have yet to receive either his written response or official communication from the Area Office regarding the proposed Fourth Quarter reallocation of Contract Support Funds from "surplus" to "shortfall" areas "...with the greatest unfunded Contract Support needs...." (Reference Attachment D, page two, ANSB correspondence to John W. Fritz, Deputy Assistant Secretary - Operations.)

The matter of reducing the administrative overhead cost base through yearly shortfalls in the Contract Support Fund line item is exacerbated by the lack of consistency exhibited by Bureau negotiating officials in interpreting the current "Interim Guidelines for Lump Sum Negotiations." For example, despite the considerable attention given to the incorporation of these guidelines into FY 1982 negotiations by Bureau Central Office officials, a single, passing reference at the outset of the initial negotiating session with Area Office officials was the extent of their incorporation into the determination of an administrative overhead cost figure. (Reference Attachment E, 25 September 1981 Acting Deputy Assistant Secretary - Indian Affairs memorandum entitled "Guidelines for Negotiation of Lump Sum Agreements.") In fact, the single consideration by Bureau officials at the negotiations was how much ANSB was requesting and how much they could allow us. No discussion pertaining to the content of our request, or comparison with the September 25 "Guidelines" for inclusion or exclusion of line items, was conducted. This example is cited in order to convey to this Committee the salutary effect the prescribed administrative overhead cost allotment formula would bring to these yearly negotiations, as well as to a probable reduction of traffic to the door of the Interior Appropriation Committee at mark-up time, inasmuch as the

BIA's estimate of an amount to request of Congress, in its January budget submittal administrative overhead costs under PL 93-638 awards, would be considerably closer to actual dollar allotments authorized by the formula than has been the case previously.

4. Negotiations for underwriting administrative overhead costs through the Contract Support Fund line item provide no opportunities for modifications in administrative approach, for personnel expansion due to school enrollment increases, or for adaptation to unforeseen circumstances that occur during the first semester of the school year. The Indian School Equalization Formula, through which funds for direct instructional programs are allocated, provides for tentative allotments for the coming school year based upon a count of students conducted in February and March of each year. Thus, if a school's enrollment changes significantly during the first six months of school, it would be discovered as the result of the Spring counting process and appropriate adjustment in tentative fund allotment would be made for the subsequent school year.

No such equitable modification procedure exists for adapting to changing circumstances for administrative overhead costs. Each negotiation for these funds is discrete and tends to be final for a given year. As noted in #1 above, ANSB has experienced reductions in the administrative overhead cost base across the term of the contract. This has occurred despite large school enrollment increases and increases in program operations and administrative responsibilities, such as Special Education and the development of our secondary curriculum.

It is an additionally well-documented fact that contract schools have had to reduce administrative overhead costs through reductions in personnel and in provision of support services. The effects of these actions are very discouraging to schools considering contracting under PL 93-638. As contract schools are forced to reduce these necessary personnel, "self-determination" becomes a hollow phrase and retrocession of entire educational programs is a possibility subject to undertaking.

5. As a contracting organization, ANSB faces stiff competition with tribes, tribal organizations, and other schools for the perennially insufficient Contract Fund Appropriation. This competition is unnecessary and is contrary to Congressional intent in enacting PL 93-638. Organizations already possessing sophisticated operations with skilled negotiators are able to increase their allocations at the expense of small, under-staffed, contract schools. If tribal governing bodies choose to exercise their prerogatives, schools and organizations would have practially no access to Contract Support Fund allocations as long as the educational administrative overhead cost appropriation is not treated separately in a formula as mandated by PL 95-561.

6. Contract school problems of insufficient administrative overhead cost allocations resulting from the Bureau's failure to separate out its own administrative costs level and to request appropriations for contract schools at that same level. This is as mandated by Section 106(h) of PL 93-638, as follows:

> The amount of funds provided under the terms of contracts entered into pursuant to Sections 102 and 103 shall not be less than the

> appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered under the contract: Provided that any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract.

The Bureau's continued lack of compliance with this specific legislative mandate is detrimental to the performance level of the sixty contract schools now operating nationwide. The Bureau's internal, administrative capacity has never been reduced as a result of appropriation shortfalls. (In this regard, it is heartening that the Conferees on the FY 1982 Interior Appropriation bill agreed as follows on the need for the Bureau to identify its proposed costs for administration under a separate line item, and separately to identify funds budgeted for administration of education programs. (Reference Attachment F, Report No. 97-315, dated 5 November 1981, 97th Congress - 1st Session, at page 18.)

This Bureau's lack of compliance with the Congressional mandate contained in PL 95-561 is a critical deterrent to the educational self-determination envisioned by Congress in its passage of PL 93-638.

7. Problems of definition and use of terms in connection with administrative overhead continue to hamper contracting organizations. This has resulted in an exceedingly complex nomenclature, such as "indirect costs," "Over/under recovery," and "theoretical overrecovery" which then makes recovery of contract school administrative overhead costs practically inextricable from the Contract Support Fund line item.

Implementation problems prompted the Bureau to allow schools to abandon the "rate" approach and use a "lump sum" agreement method. Guidelines, again hastily drafted during FY 1981, were issued on an interim basis to be used by BIA contracting officers during PL 93-638 negotiations with schools. The guidelines, and their subsequent mid-year revisions, were criticized by contract schools right up to the issuance of the aforementioned September 25 memorandum from the Central Office to Area Offices, prescribing their incorporation into FY 1982 contract negotiations. Contract schools, including Alamo, submitted written comments and met with BIA Central Office staff to try to reach a workable accommodation with the interim guidelines. Based upon my own experience in negotiating a FY 1982 contract under the purview of the interim guidelines, only the formula as mandated by the Congress at Section 1128 of PL 95-561 can rescue contract schools from the morass surrounding the identification -- and recovery -- of administrative overhead costs allowable under PL 93-638 awards. An allotment formula and distribution system using the same procedures and mechanism as already used for the Indian School Equalization Formula (ISEF) itself, is critically needed.

8. It is our opinion that the Bureau's erroneous interpretation and continued application of the term "indirect cost" in PL 93-638 contract award negotiations has resulted in: (a) fewer dollars for schools' administrative overhead costs than intended in the passage of PL 95-561 and (b) very costly and inconclusive studies and many unnecessary meetings involving Department of the Interior's Office of Inspector General, BIA, and contract schools. The results from all this activity have been counterproductive to contract school educational attainment, and have served to forestall resolution of the central

issue -- that of projecting a realistic figure as a line item in the yearly appropriation request from which a timely distribution of that subsequent appropriation could be made through a precise formula process.

"Indirect costs" is an accounting concept and is very useful in that context. It is distinct from "direct costs." Both are definable and may be applied to an accounting for costs associated with "administrative overhead" costs of operating a school -- the term that is more truly descriptive of these kinds of expenses. Schools are eligible to receive administrative overhead costs reimbursement for programs they operate. The major portion of these administrative overhead costs are directly identifiable and can be allocated to direct cost pools in the administrative budget; the remaining costs, not readily separable and assignable to specific areas of the administrative budget, are true indirect costs. Use of "indirect cost rates" as a method of determining the administrative overhead costs for contractors has been, and is, totally inappropriate.

9. The lack of policy direction from the Office of Assistant Secretary for Indian Affairs, regarding administrative overhead costs for schools continues, as evidenced by the failure of the Bureau to promulgate a rule for PL 95-561 Educational Standards. This is also as agreed in the Interior Appropriations Committee Conference Report for FY 1982. This failure is noted on page seventeen of Report No. 97-315, dated 5 November 1981 as follows.

> The managers further agree that the Bureau must complete work on its proposed educational standards, so that an adequate base for school funding can be determined in the future.

It is unlikely that any resolution of this problem will occur until clear direction and policy are developed. In view of these problems created for contract schools in obtaining adequate administrative overhead costs, resulting from BIA interpretation of the PL 93-638 mandate concerning administrative overhead costs allocable to those awards, the following recommendations are made for this Committee to consider in its deliberations concerning regulatory revisions to the Indian Self-Determination and Educational Assistance Act:

1. Instruct the Office of Assistant Secretary for Indian Affairs, Department of the Interior, to include in the proposed regulatory revision to Public Law 93-638 the proviso that contract school and Bureau of Indian Affairs' educational administrative costs will be treated separately in Budget requests to the Interior Appropriation Committee, in accordance with the Conference Report language cited at page ~~eight~~ five, item ~~five~~ six above; and
2. Ensure that such funding as stipulated above be allocated to eligible schools through use of a formula, as mandated in Public Law 95-561, Section 1128(a)(2)(D).

We are most appreciative of this opportunity to present our recommendations to this committee. We thank you for your consideration of these comments.

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Self-Determination Services

RECEIVED
APR 21 1982
ANSR, INC.

APR 08 1982

ATTACHMENT A

MEMORANDUM

TO: All Area Directors

FROM: Deputy Assistant Secretary - Indian Affairs (Operations)

SUBJECT: FY 1982 Contract Support Funds Allotments

The Advices of Allotments for FY 1982 Contract Support Funds are being processed. You should be receiving them shortly.

We regret the lateness of this action, but have withheld processing these until the effects of budget reductions on contracted programs could be assessed and until tribal needs were known in the area of contract support.

While the Bureau received Contract Support Funds appropriations in the amount of $27,322,000 for FY 1982, we have projected tribal needs of approximately $31,344,747. This constitutes an expected shortfall in Contract Support Funds of approximately $4,022,747. The total projected need divided into the appropriation received gives the Bureau an overall, approximate, funding level of 87%.

However, costs associated with separations due to increased tribal contracting must be funded at the 100% level. These costs, which are paid from the Contract Support Funds appropriation, decrease the total available Contract Support Funds to approximately 85.2%.

Please notify contracting tribes and non-profit tribal organizations in your Area of this reduction in Contract Support Funds. Contracts which are in place utilizing a projected need in excess of 85.2% will have to be reduced to the percentage available in order to equitably distribute the FY 1982 appropriations throughout the contracting groups.

In order to reduce or eliminate the shortfall in Contract Support Funds, you may wish to explore with tribes the use of surplus program funds, if available. These could come from either savings in the program being contracted or from other programs at the field level where savings have been effected. However, the level of delivery of services to Indian beneficiaries must be carefully assessed before this option is used. Further, reprogramming/reallocation policies and procedures would apply.

In such an instance, funds appropriated for Social Service grants, Employment Assistance grants, and other Federal assistance grants funds appropriated for specific Bureau programs, may not be utilized to cover this shortfall. However, if tribes wish to reallocate Self-Determination grants funds to cover contract support costs, they may. Reallocation policies and procedures must be adhered to, and the impact on tribal development of management systems and other priority tribal needs must be fully assessed.

Those Area Offices which requested a specific allocation to cover separation costs are required to submit supporting documentation of such costs to this office immediately. Funds allocated for this purpose by the Advices of Allotment being processed, are to be considered tentative until the needs projected for separation costs are substantiated. If an Area cannot substantiate the need as requested, funds will be withdrawn to the level that is justified and the balance reallocated to a general Contract Support Funds "pool". This office will then apportion those surplus funds to the Areas with the greatest unfunded Contract Support needs.

John R.

Attachment

FY 1982
Contract Support Funds
Allocations

* * * * *

Aberdeen Area Office	$ 4,405,532
Albuquerque Area Office	1,935,605
Anadarko Area Office	543,422
Billings Area Office	1,122,400
Eastern Area Office	870,058
Juneau Area Office	3,172,822
Minneapolis Area Office	1,219,462
Muskogee Area Office	630,176
Navajo Area Office	5,166,090
Phoenix Area Office	2,741,200
Portland Area Office	5,461,716
Sacramento Area Office	53,517
	$27,322,000

ATTACHMENT B

Contract Support Fund
Fiscal Year Comparisons
Since Passage of Public Law 93-638, 4 January 1975
FY 1976 - FY 1982

I	II	III	IV	V	VI	VII	VIII	IX	X	
Fiscal Year (Beg. Oct. 1)	January Budget Request to Congress	Percent Col. II is of Col. VII 93-638 Awards	Congressional Appropriation for Indirect Costs in the Public Law	Percent Col. IV is of Col. VII (93-638 Awards)	Difference Col. II (Request) to Col. IV (Appropriations) ±	Amount of PL 93-638 Awards	"Need" for Indirect Costs Through Contract Support Fund	Percent Col. VIII "Need" is of Col. VII Awards	Difference Between Col. II (Request) & Col. VIII "Need" ±	EXPLANATION
1976	$11,200,000	?	$10,700,000	?	$+ 500,000	?	?	?	?	
1977	$11,130,000	?	$ 9,777,000	?	$+ 1,360,000	?	?	?	?	
1978	$ 9,770,000	?	$ 8,742,000	?	$+ 1,028,000	?	?	?	?	
1979	$10,940,000	?	$23,577,000	?	$-12,637,000	?	?	?	?	
1980	$23,577,000	11.72	$23,777,000	11.82	$- 193,000	$201,167,000	$22,328,000	11.10	$+1,249,000	The Jan. budget request over-estimates by $1,249,000 indirect cost need at an avg. rate of 11.10%
1981	$25,873,000	12.13	$25,873,000	12.13	0	$213,366,000	$27,559,000	12.92	$-1,686,000	The Jan. budget request under-estimates by $1,686,000 indirect cost need at an avg. rate of 12.92%
1982	$28,460,000	14.12	$27,322,000	13.56	$- 1,138,000	$201,505,000	$34,153,000	16.95	$-5,693,000	Contract Support Fund "Shortfall" lowers the FY 1983 Contract Base for indirect cost negotiations
1983	$30,338,000	N/AV	N/AV	N/AV	N/AV	N/AV	N/AV	N/AV	N/AV	Not available due to timelag between request, appropriation and subsequent Fiscal Year Award.

LEGEND: (1) Information for Columns II, IV, VI provided by BIA Central Office - Financial Management Assistance Division.
(2) Information for Columns VII, VIII, IX provided by BIA Central Office - Self Determination Services Division Chief.
(3) Computation Basis for Column VIII "Need" not given by BIA as that figure pertains to the Column IX indirect cost rate figure.
(4) "?", Column VII "Awards" and Column VIII "Need" not provided by BIA Self Determination Services Division Chief.
(5) N/AV - Fiscal Year 1983 data not available beyond January budget request as of 30 June 1982 hearing date.

ATTACHMENT C

Alamo Navajo School Board, Inc.
P.O. BOX 907
MAGDALENA, NEW MEXICO 87825
(505) 854-2543

January 28, 1982

Mr. Douglas Sakiestewa
Contracts Officer
Navajo Area Office
Bureau of Indian Affairs
P.O. Bx. 1060
Gallup, New Mexico 87301

Re: Contract #NOO C 1420 8553

Dear Mr. Sakiestewa:

After meeting with you and your staff, including the Agency Superintendent for Education, Mr. Holman, the Alamo Navajo School Board and the BIA agree on a lump sum amount of $381,000 to cover the indirect (overhead) costs of this program during fiscal year 1982.

This agreement is subject to the following understandings:

1. Of the agreed amount, only $356,000 is presently available for obligation. It is therefore understood that the above contract will be modified now only in accordance with the $356,000 level. The balance of the agreed amount will be added to the contract when and only if the Area Office experiences a surplus in the contract support line item this fiscal year or if other funds which may be used for these purposes becomes available through advice of allotment or otherwise.

2. By entering into this agreement, the Alamo Navajo School Board does not waive any rights it may have to challenge the basis for or the procedures used in arriving at the agreed amount(s) by the BIA. Further, by entering into this agreement, the Alamo Navajo School Board makes no admission that the agreed amount is adequate or reasonable considering the scope of its program and its location.

3. The parties recognize that the ISEP formula used in distributing direct education program monies by the BIA makes no allowance for the cost of renting classrooms or other education facilities nor does it include monies for operation and maintenance of facilities.

If the language above accurately records the understanding and agreement reached with you today, please sign in the space provided below and return a signed copy to me.

We appreciate your courtesy and cooperation in this matter.

Sincerely,

Walter Apachito
WALTER APACHITO
President

William Berlin
WILLIAM BERLIN
Acting Director

ACKNOWLEDGED:

Douglas Sakiestewa
Contracts Officer

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS

IN REPLY REFER TO

Navajo Area Office
Box 1060
Gallup, New Mexico
87301

Mr. Walter Apachito
President
Alamo Navajo School Board
P.O. Box 907
Magdalena, New Mexico 87825

October 22, 1981

Dear Mr. Apachito:

A resumption of negotiations concerning Alamo's overhead costs (indirect costs) for fiscal year 1982 took place at Gallup today involving Mr. Larry Holman, Agency Superintendent for Education, Mary Hanis of this office, yourself, and board members, staff and legal counsel for Alamo.

It was not possible to reach agreement as to a lump sum for overhead. Instead, the Board, wishing to preserve its legal options, asked for authorization to expend during an interim period 90% of last year's agreed-to sum, which was $381,000, pending resolution of certain issues regarding the BIA's procedures relative to indirect costs and overhead for contract schools. The amount therefore requested for authorization is $342,900 per annum, as an interim arrangement.

By this instrument I am agreeing to your request, and agree that the interim authorization shall extend to January 1, 1982. WA

I am also approving an agreement to add $22,000 to last year's level of indirect costs funding, which I understand will be sufficient to enable us to close out the fy 1981 contract year.

If you wish to resume discussions concerning a lump sum agreement for overhead (indirect) costs for fy 1982, please let me know. In the meantime, please sign in the space provided below to indicate your agreement with my summary of today's negotiations.

Sincerely,

Stanley Nakiestewa
Contracts Officer

Approved:

Walter Apachito

BEST COPY AVAILABLE

ATTACHMENT D

Alamo Navajo School Board, Inc.
P.O. BOX 907
MAGDALENA, NEW MEXICO 87825
(505) 854-2543

24 May 1982

John W. Fritz, Deputy Assistant Secretary--Operations
U.S. Department of the Interior
C Street between 18th and 19th Streets N.W.
Washington, D.C. 20240

Dear Mr. Fritz:

Navajo Area Director Donald Dodge has informed Alamo Navajo School Board of his March request to you for a supplemental appropriation for the purpose of purchasing nine portable school buildings which are currently being leased by the Alamo Navajo School Board pending an appropriation for construction of a permanent campus. (An Architect-Engineer contract to complete "Design of Construction" documents for a 54,000+ square foot campus at Alamo, at a projected construction cost of $8.5 million, has recently been awarded by the Bureau of Indian Affairs). We now understand that Area Director Dodge's request will not be part of HR 5922, the fiscal year 1982 Supplemental Appropriations Bill, reported as amended by the Senate Appropriations Committee on May 18.

We, therefore, want you to be aware of the serious financial burden which having to pay the yearly $112,200 building rental, from the instructional program allotment under the Indian School Equalization Formula, creates for the School Board. (It is our opinion that if the educational standards called for in Public Law 95-561 had been submitted for Congressional approval as mandated, that the language concerning "overhead costs associated with administering contracted education functions" would make provision for underwriting rental costs of these necessary temporary facilities. This P.L. 95-561 language appears at Section 1128 (a) (D), "Allotment Formula", and is in accordance with P.L. 93-638, the Indian Self-Determination and Educational Assistance Act, where Section 106 (h) states that "the amount of funds provided under ... contracts ... shall not be less than the Secretary would have otherwise provided for his direct operation of the program ... for the period covered by the contract.")

In this regard, we understand that the lack of the proposed P.L. 95-561 - Educational Standards rule, was raised during the recently concluded House Interior Appropriation Subcommittee hearing on the BIA FY 1983 Budget, and, that the prepared remarks of the Assistant Secretary for Indian Affairs noted the absence of these regulations as a "Shortfall" of his administration. So that Alamo Navajo School Board's budgetary shortfall of $112,200 -- resulting from the absence of P.L. 95-561 regulations -- can be alleviated, I urge your consideration of a Fourth Quarter/Fiscal Year 1982 reprogramming within the Construction, Buildings and Utilities Activity for the purpose of underwriting this overhead cost.

The above predicament, combined with your April notice to Area Directors that P.L. 93-638 Contract Support Funds are projected at an aggregate level of 85.2% of total need, will -- if not remedied -- create an additional School Board budgetary shortfall approximating $55,000. I, therefore, further urge that the Fourth Quarter apportionment of surplus funds, as stated in your memorandum, include this $55,000 for the Navajo Area Office to allocate to Alamo Navajo School Board.

If forced to continue to underwrite the above-described financial burdens from direct instructional monies provided from the Indian School Equalization Formula, our School Board may have to accept the reality that attempting to educate an increasing number of Navajo students -- currently 300+ in this Spring Semester -- with decreasing dollars, is inviting failure at the risk of these Navajo children's future. (This realization will certainly come to pass when the consolidation of school facilities, as envisioned in the Navajo Day School Study, funnels an additional 100-200 students to Alamo as a result of closure of the Magdalena Dormitory.)

Your response reflecting the gravity of our financial situation will be appreciated.

Sincerely,

William Berlin

William Berlin, Ph.D.
Executive Director

cc: Honorable Manuel Lujan (R-N.M.-1st)
Honorable Harrison Schmitt (R-N.M.)
Honorable Sidney R. Yates, Chairman
House Interior Appropriations Subcommittee
Mr. Donald Dodge, Navajo Area Director
Mr. Gary Townsend

P.S. The attached FY 1980 and FY 1981 BIA documents depict the financial problems described above; the yearly decrease in the Contract Support Fund line item, and the ambiguity over defining administrative overhead costs due to P.L. 95-561 regulations not being finalized, are detrimental to the success Congress envisioned in passage of the Indian Self-Determination Act.

ATTACHMENT E

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Indian Services
638

SEP 25 1981

RECEIVED
OCT 0[illegible] 1981
ANSB, INC.

Memorandum

To: Central Office Directors
Area Directors
Area Education Program Administrators
Agency Superintendents
Agency Superintendents for Education

From: Acting Deputy Assistant Secretary - Indian Affairs (Operations)

Subject: Guidelines for Negotiation of Lump Sum Agreements

Subject guidelines are attached. Since their initial issuance early in 1981, these guidelines have been reviewed substantially. Representatives of different contract schools, and particularly those in the Navajo Area, both individually and through their attorneys, have provided constructive comments.

These comments have been considered, and while an affirmative response could not be given to each one, they have been substantially reflected in these revised guidelines. While contract schools will be invited to submit further comments, it is believed these guidelines provide a realistic basis for conducting negotiation for FY 82 school operations. Accordingly, they are to be so used. While you are authorized to conduct necessary lump agreements with the contract schools, please advise all contractors that any agreement is subject to availability of funds.

Your cooperation in this matter is appreciated.

Theodore C. Krenzke

Attachment

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Indian Services
638

SEP 25 1981

RECEIVED
OCT 05 1981
ANSB, INC.

Dear Tribal Leader:

Enclosed is a copy of the revised Guidelines for Negotiation of Lump Sum Agreements as pertains to contract schools. Also enclosed is a memorandum addressed to our key Area staff concerning these guidelines.

As noted in that memorandum, we have received useful and constructive comments on these guidelines from contract school representatives, particularly from the Navajo Area. While we were unable to respond in an affirmative fashion to each comment, we believe they have contributed significantly toward improvement of the guidelines' document. We believe they now provide a realistic basis for the negotiation of lump sum agreements. Accordingly, we have so informed our area Staff. However, we would appreciate further comments, should you care to offer them.

We also must note because of budgetary uncertainties, we have advised our Area staff that negotiations must be conducted on an availability of funds basis. As soon as this situation is resolved, Area staff will be informed and asked to share the information with you.

Your cooperation in this matter is appreciated.

Sincerely,

Theodore C. Krenzke

Acting Deputy Assistant Secretary -
Indian Affairs (Operations)

Enclosures

REC. 1/28/81
UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Sept 15
Draft

Interim Guidelines for Negotiation of Lump Sum Agreements

I. Purpose: These guidelines provide guidance for Bureau staff in the negotiation of Lump Sum agreements for the payment of administrative costs of contract schools on a cost reimbursable basis.

Contract schools which operate other non-education programs will be required to negotiate an Indirect Cost rate for the payment of administrative costs.

II. General: These guidelines are in accord with requirements published in 25 CFR 276 Appendix A and 25 CFR Part 31h (the Indian School Equalization Program).

Generally, these guidelines assume that the procedures and requirements for payment of costs associated with the operation of schools by the Bureau of Indian Affairs provide a realistic procedure for determining allocability of costs for contract schools operated by Indian tribes and Indian organizations.

III. Definitions and Comments:

A. Program Costs: Costs for activities for which funds are provided to schools operated by or under contract with the Bureau of Indian Affairs in accordance with the provisions of the Indian School Equalization Program Regulations, 25 Code of Federal Regulations §31h and which are costs normally incurred at schools of comparable size and scope operated by the Bureau.

B. Contract Administration Costs: Reasonable costs for activities which must be carried on by a tribal organization in operating a school under contract with the Bureau of Indian Affairs to insure compliance with the terms of the contract and prudent management of the contract but which are not normally carried on by a school of comparable size and scope operated by the Bureau of Indian Affairs. Cost such as contract management (including management functions of the contracting school board or tribal governing body), contract reporting and recordkeeping, contract budgeting and procurement, finance, personnel administration, insurance, legal and accounting. Funds for these costs are provided to prevent program deterioration, not for program and administrative enhancement.

C. Lump Sum: A negotiated fixed amount in lieu of indirect costs may be appropriate under circumstances where the benefits derived from a grantee department's indirect services cannot be readily determined as in the case of small, self-contained or isolated activity. When this method is used, a determination should be made that the amount negotiated will be approximately the same as the actual indirect cost that may be incurred.

The lump sum agreement will be based on reasonable projection of estimated administrative costs to be incurred by the tribal organization.

For this particular application the provision of 14 H-70.1002(b) limiting lump sum agreements to contracts less than $10,000 and the lump sum limitation not to exeed 10 percent of the direct labor cost will be waived.

IV. Concept of Reasonableness: All costs must be considered for reasonableness in accord with the following definition:

> "Reasonable Cost: A cost may be considered reasonable if the nature of the goods or services acquired or applied, and the amount involved therefore, reflect the action that a prudent person would have taken under the circumstances prevailing at the time the decision to incur the cost was made. Major considerations involved in the determination of the reasonableness of a cost are: (a) whether or not the cost is of a type generally recognized as necessary for the operation of the institution, (b) the restraints or requirements imposed by such factors as arm's length bargaining, Federal and State laws and regulations, research agreement terms and conditions; (c) whether or not the individuals concerned acted with due prudence in the circumstances, considering their responsibilities to the institution, its employees, its students, the Government, and the public at large; and (d) the extent to which the actions taken with respect to the incurrence of the cost are consistent with established institutional policies and practices applicable to the work of the institution."

V. Implementation of Guidelines:

(a) These guidelines may be used immediately as an assist in the negotiation of a lump sum payment for the administrative cost of an eligible contract school.

(b) These guidelines are applicable to all negotiations by the OIG and the BIA contracting officer to determine administrative or indirect cost of a contract school.

(c) All eligible schools are not required to go lump sum. Each school has the option of selecting an annual negotiated indirect cost rate by the OIG or enter into a lump sum agreement with the BIA. Once lump sum agreement or the indirect cost method has been selected this process must be continued a minimum of three years.

VI. Categories of Cost:

These guidelines will be used for the purpose of negotiating lump sum agreements for administrative costs of Bureau funded educational programs in contract schools. Other funding agencies are responsible for their pro-rata share of administrative cost.

During negotiations, the appropriate officer of the Office of Indian Education Programs shall be present to advise the Contracting Officer to assure that all costs are identified as either a direct program cost or administrative cost. Only those administrative costs appropriately identified will be negotiated through lump sum agreement.

The lump sum agreement is subject to the availability of funds.

Any questions of fact during and after the negotiations shall be handled as a Dispute covered under the general provisions of the contract or 25 CFR Part 271, Subpart G-Hearings and Appeals.

Prior to the contract negotiations except for 1, 2, 5 for initial contracts the contractor shall submit the following:

1. Actual program cost for prior fiscal year;
2. Actual administrative cost for prior fiscal year;
3. Administrative cost projections for current fiscal year;
4. Program cost projections for current fiscal year;
5. Audit and close out data for the prior fiscal year.

Provisions shall be made during negotiations for a line item to cover audit cost for the purpose of contract close out. This cost is to be paid for as an administrative cost. An audit report for the prior school year will be submitted by August 1st.

Technical assistance in preparing projected program and administrative cost is available from the appropriate officer of the Bureau of Indian Affairs.

ATTACHMENT F

97TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
No. 97-315

MAKING APPROPRIATIONS FOR THE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1982

NOVEMBER 5, 1981.—Ordered to be printed

Mr. YATES, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany H.R. 4035]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 4035) making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1982, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 3, 5, 10, 15, 27, 29, 56, 66, 67, 80, 87, 91, 98, 110, 113, 120, 121, 128, 133, 137, 139, 141, and 142.

That the House recede from its disagreement to the amendments of the Senate numbered 7, 13, 18, 19, 26, 30, 34, 40, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 54, 59, 60, 61, 65, 68, 70, 71, 72, 81, 82, 83, 84, 89, 90, 94, 96, 100, 102, 105, 109, 115, 116, 129, 138, 140, and 143, and agree to the same.

Amendment numbered 14:

That the House recede from its disagreement to the amendment of the Senate numbered 14, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$6,961,000*; and the Senate agree to the same.

Amendment numbered 16:

That the House recede from its disagreement to the amendment of the Senate numbered 16, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$17,178,000*; and the Senate agree to the same.

Amendment numbered 17:

),838,000 as proposed by the Senate. The increase over the nount proposed by the Senate restores $115,000 of the reduction $230,000 from the state and Federal programs.

Amendment No. 39: Appropriates $106,335,000 for the Abanned Mine Reclamation Fund instead of $115,227,000 as proposed the House and $105,335,000 as proposed by the Senate. The inease over the amount provided by the Senate is $1,000,000 for the iral Abandoned Mine Program. The managers agree that 6,000,000 shall be transferred to the Bureau of Mines. Of this nount, $850,000 is to be used for exploratory drilling and related ork in Centralia, PA. The managers expect the Bureau of Mines id the Office of Surface Mining to give top priority to the lives id property of Centralia residents. The managers expect the Deirtment to develop a workable plan to implement this directive id report back to the House and Senate Appropriations Commites on the proposed implementation of this plan within 30 days ter enactment of this bill

The managers agree that the Department should formulate a mprehensive plan to provide for the most effective system for devery of abandoned mine reclamation services. The Department iould report back to the House and Senate Committees on Approiations no later than February 15, 1982.

Amendment No. 40: Deletes House language as proposed by the enate. The managers are in agreement that funds appropriated to ie Office of Surface Mining Reclamation and Enforcement may be sed for administrative expenses for a program that includes the organization of its field organization. The managers agree furier, however, that any reorganization plan shall not include the ansfer of the OSM Western Technical Center at Denver, Colora-).

BUREAU OF INDIAN AFFAIRS

Amendment No. 41: Reported in technical disagreement. The ianagers on the part of the House will offer a motion to recede nd concur in the amendment of the Senate with an amendment as ›llows:

In lieu of the sum proposed by said amendment, insert the folowing: *$835,646,000, of which not to exceed $4,000,000 shall be vailable for grants to the Navajo Community College, pursuant to 5 U.S.C. 640c-1, as amended, and*

The managers on the part of the Senate will move to concur in he amendment of the House to the amendment of the Senate. The mendment appropriates $835,646,000 instead of $797,395,000 as roposed by the House and $814,742,581 as proposed by the Senate.

The net increase over the amount proposed by the Senate consists of the following: increases of $1,754,000 for Indian school qualization formula, $348,000 for the Institute of American Indian Arts, $998,619 for grants to new tribally-controlled community coleges, $2,700,000 for housing, $1,126,000 for the Office of Technical Assistance and Training, $650,000 for road maintenance, $3,450,000 or ADP procurement, $3,500,000 for facilities management, 4,545,000 for management and administration, and $10,000,000 inrease resulting from a reduction to the Indian moneys, proceeds of abor (IMPL) offset; and decreases of $300,000 to Public Law 93-638 ommitments, $972,000 for Navajo Community College, $2,000,000 for social services, $138,000 for law enforcement, $4,257,000 for employment assistance, $500,000 for irrigation and power, and $1,200 for rounding-off IMPL transfer amounts.

The managers are in agreement that the Indian school equalization formula includes a transfer of $754,000 formerly budgeted under P.L. 93-638 commitments and $1,000,000 budgeted under program management for P.L. 93-638 contracts. In the future, no P.L. 93-638 contract funds should be budgeted under school operations. The managers further agree that the amount provided for the Indian school equalization formula, $158,466,000, will provide a base student value of approximately $2,070, based on current estimates of student enrollment, and that no special programs, as enumerated in the FY 1982 January budget submission, are to be deleted." The managers further agree that the Bureau must complete work on its proposed educational standards, so that an adequate base for school funding can be determined in the future. "

The managers agree that the reduction of $2,900,000 in the Johnson-O'Malley program is to remove tribally-controlled contract schools from the program. The managers note that these schools are funded under the Indian school equalization formula, and are also eligible to receive grants under the Department of Education's Indian Education program.

The managers are in agreement on a limitation of $4,000,000 for the Navajo Community College. The Bureau should take all necessary action, including initiating a periodic disbursement system, to ensure the College does not exceed this level of expenditure. The managers also agree that the $4,000,000 increase in the social services program is to provide for general assistance payments for Alaska natives for a six-month period. This will allow time for the Alaska State legislature to appropriate state funds to provide these payments from that time on. If the Bureau finds that $4,000,000 is not sufficient to provide the level of payments to eligible Alaska natives during this six-month period as required based on need, the managers agree that such payments may be made from the remainder of the Bureau's social services program until state funds become available, but not beyond April 1, 1982.

The managers are in agreement that the funds formerly budgeted under the Indian Action program, including the increases of $4,600,000 to housing, $4,450,000 to employment assistance, $750,000 to road maintenance, $1,400,000 to business enterprise development, $500,000 to agriculture, $323,000 to water resources, and $300,000 to wildlife and parks, should be available in FY 1982 at the same location at which the Indian Action money would have been spent. In particular, the Sandia Pueblo, Coushatta tribe, and Fort Hall reservation should receive the same level of support as they received in fiscal year 1981. The Bureau should develop clear guidelines for the use of these funds, in line with the recent Inspector General's report, and in future years, should evaluate these programs for adherence to the guidelines for program effectiveness before renegotiating contracts with the same tribes. The additional $2,700,000 provided for housing shall be used for priority projects under existing HIP guidelines.

The managers agree that within the funds provided for law enforcement, an additional $70,000 is to be available to establish a ubstation at Dunseith, North Dakota, and to improve law enforce-nent activities on the Standing Rock reservation.

The managers are in agreement that a total of $57,705,000 is in-luded for General Administration, including reductions of $60,000 rom the Office of Public Affairs, $1,550,000 from general manage-nent, $257,000 from the Office of the Commissioner, and $4,000,000 rom facilities management; and increases of $2,853,000 formerly udgeted under the Construction appropriation, and $1,692,000 for-nerly budgeted under the Road Construction appropriation. The nanagers also agree that General Administration should be treat-d as a separate budget activity and should be fully justified in the Y 1983 budget submission, including a full explanation of any pro-osed changes and also including funds budgeted for administra-ion of education programs.

The managers direct that as part of the fiscal year 1983 budget ubmission, all non-essential activities currently conducted by the ffice of Technical Assistance and Training be identified as areas f possible savings for future years.

The managers are in agreement that the Bureau may conduct a ilot project in each of the areas to determine the impact of the roposed consolidated grant program. Such a pilot grant program hall be implemented only with the concurrence of the affected tribe.

Amendment No. 42: Provides $57,349,000 for higher education scholarships and assistance to public schools as proposed by the Senate instead of $60,249,000 as proposed by the House.

Amendment No. 43: Inserts codification of the Act cited by the House, as proposed by the Senate.

Amendment No. 44: Adds a reference to the sections following 25 U.S.C. 450, as proposed by the Senate.

Amendment No. 45: Inserts codification of the public law cited by the House, as proposed by the Senate.

Amendment No. 46: Adds a reference to a previously cited Act, as proposed by the Senate.

Amendment No. 47: Deletes a statutory citation, as proposed by the Senate.

Amendment No. 48: Appropriates $97,529,000 for construction instead of $112,619,000 as proposed by the House and $79,282,000 as proposed by the Senate. The net increase above the amount proposed by the Senate consists of the following: increases of $200,000 for the Rosebud Sioux law enforcement facility, $18,500,000 for the Ak Chin irrigation project, $1,400,000 for other irrigation projects and $1,000,000 for irrigation construction, engineering and supervision; and a decrease of $2,853,000 for construction program management, transferred to the Operation of Indian programs appropriation.

The managers are in agreement that funds for the Black Mesa Day School cannot be provided until submission of the Navajo Day School Study by the Bureau, so that the proper size of the school can be determined. If this issue is resolved in a timely fashion, the managers agree that a request for supplemental funding in fiscal year 1982 will be carefully considered.

The managers are in agreement that a supplemental request for the Ak Chin irrigation project will also be carefully considered, if the project managers are able to maintain the original construction schedule and additional funds in fiscal year 1982 are required to meet the January 1984 deadline for first water delivery.

The managers are concerned with the current method of funding for Indian irrigation projects. Beginning with the fiscal year 1983 budget submission, the Bureau is directed to submit a legislative package to the appropriate authorizing committees for any irrigation construction projects for which initial funding is being requested. A complete justification of the funding required for the projects should also be submitted to the Appropriations Committees as part of the budget submission. No funds will be provided for any projects for which an authorization request has not been submitted to the Congress, in time to allow appropriate consideration by the Committees involved.

Amendment No. 49: Inserts the name and statutory citation of 25 U.S.C. 13, as proposed by the Senate.

Amendment No. 50: Inserts parentheses and comma after Code reference cited by the House, as proposed by the Senate.

Amendment No. 51: Inserts a reference to the Act of May 26, 1928, as proposed by the Senate.

Amendment No. 52: Inserts parentheses and comma after Code reference, as proposed by the Senate.

Amendment No. 53: Appropriates $49,125,000 for road construction instead of $48,800,000 as proposed by the House and $50,816,810 as proposed by the Senate. The increase over the amount proposed by the House is $325,000 transferred from the Indian moneys, proceeds of labor (IMPL) fund.

The managers agree that the amount appropriated does not include $1,300,000 for the Manila Creek Road on the Colville Indian Reservation, since the road is not the tribe's highest priority.

Amendment No. 54: Deletes separate General Administration appropriation proposed by the House.

Amendment No. 55: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate with an amendment as follows:

In lieu of the matter proposed by said amendment, insert the following: *Provided further, That (except in the case of funds held in trust for Indian tribes or individuals) the funds available for expenditure under the "Indian moneys, proceeds of labor" accounts authorized by the Act of May 17, 1926 (Chap. 309, 44 Stat. 560; 25 U.S.C. 155); the Act of March 3, 1883 (22 Stat. 582) in the fifth paragraph under the heading "INDIAN AFFAIRS" (22 Stat. 590; 25 U.S.C. 155); and the Act of March 2, 1887 (24 Stat. 449) in the first paragraph under the heading "MISCELLANEOUS" (24 Stat. 463; 25 U.S.C. 155) may be expended until September 30, 1982, for any purpose for which funds are appropriated under the subheading "Operation of Indian Programs". On September 30, 1982, the balance of such accounts (except for the funds held in trust for Indian tribes or individuals, and not to exceed $10,000,000 which shall be available until expended by eligible tribes for purposes approved by the Bureau of Indian Affairs) shall be deposited into miscellaneous receipts of the Treasury to offset outlays of the Bureau of Indian Affairs and thereafter no funds shall be deposited in such accounts other than funds held in trust for Indian tribes or individuals*

Sidney R. Yates,
(except amendment
No. 97),
Clarence D. Long,
John P. Murtha,
Norman D. Dicks,
Les AuCoin,
Jamie Whitten,
Joseph M. McDade,
Ralph Regula,
Silvio O. Conte,
Managers on the Part of the House.
James A. McClure,
Paul Laxalt,
Jake Garn,
Harrison J. Schmitt,
Thad Cochran,
Mark Andrews,
Warren B. Rudman,
Mark O. Hatfield,
Robert C. Byrd,
J. Bennett Johnston,
Walter D. Huddleston,
Patrick J. Leahy,
Dennis DeConcini,
Quentin N. Burdick,
Dale Bumpers,
Managers on the Part of the Senate.

Mr. HOFFMAN. I would like to make just one more comment. Secretary Smith's written testimony indicates that the shortfall in indirect for this year is higher than in previous years. It is four times as much as it was last year. It is $6 million short and that is under a Senate order to prevent a shortfall. We find that a highly disgraceful situation.

Mr. MULKEY. BIA does not always follow the directions of the Senate, unfortunately.

I want to thank you all for coming.

The additional statements we have received will be made a part of the record and the record will be held open for 45 days, as the Senator indicated, for receipt of additional statements and comments.

The hearing will be adjourned.

[Whereupon, at 2:10 p.m., the hearing was adjourned, subject to the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL RECEIVED FOR THE RECORD

Box 625
Martin, S. Dak.
August 10, 1982

Honorable William S. Cohen:

I am writing to you in concern of our Colleges, not only LaCreek College and CETA programs. This concerns our other Colleges.

This is my second year of College after having received my GED in 1980. Please, HELP! We need your support on these programs.

I went to College with some of my children and attended the same classes with them. Two of my sons and two daughters are married with families. We are getting an education to better ourselves and help the younger generation.

Sincerely.

s/ Rebecca Apple

ASSOCIATION OF NAVAJO COMMUNITY CONTROLLED
SCHOOL BOARD, INC.
c/o RRDS - Box 217
Chinle, Arizona 86503

August 06, 1982

Honorable William S. Cohen, Chairman
Select Committee on Indian Affairs
6317 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Chairman Cohen:

We, the members of the Association of Navajo Community Controlled School Boards, Inc, wish to take this opportunity to thank you for conducting the Senate Select Committee on Indian Affairs hearings on June 30, 1982. The two major topics, changing Public Law 93-638, regulations and "indirect cost" issues, are of deep, urgent concern to all of us. We are most appreciative that our representatives were given the opportunity to express some of these concerns.

Please know that the contention relating to these issues is far from being settled. The BIA apparently is proceeding with plans to convert "638" contracts to grants and cooperative agreements regardless of protestations that this is unnecessary. Additionally, information as to the processes for resolving the "indirect cost" problem will persist if the recommendations the Bureau is considering are adopted.

Therefore, we are requesting your continued attention and assistence on these issues. We are keenly aware of the effacacy of your previous efforts and have great confidence in your ability to reach your goals. We believe our goals to be congruent with those you espouse - the best education possible for all children in our nation.

Thank you for your attention to our request and for your consideration of our concerns.

Sincerely yours,

George Jim 7-29-82

George Jim, President
ASSOCIATION OF NAVAJO COMMUNITY CONTROLLED
SCHOOL BOARDS, INC.

RESOLUTION OF THE ASSOCIATION OF NAVAJO COMMUNITY CONTROLLED SCHOOLS ON THE INDIRECT COST SHORTFALL / CONTRACT SUPPORT FUND

WHEREAS:

1. We are an association of eight Navajo contract schools who presently contract under P.L. 93-638 for the operation of educational and support services programs at our schools; and

2. Since the passage of P.L. 93-638, the Bureau of Indian Affairs has requested from the Congress funds to support Indian Self-Determination administration as the Contract Support Fund; and

3. There is an excessive shortfall in this fund for FY'82, substantially greater than past BIA shortfalls in this line of the BIA budget, at approxomately $6 million for FY'82; and

4. We have been informed that we would experience at least an 8% shortfall in our contracts for administrative services, either via a indirect cost rate or the alternative lump sum method; and

5. This year's shortfall, as in past years, is not the fault of Indian contractors, but of BIA mismanagement and incompetence, and will cause our schools to curtail essential services and to under-recover required funds on an indirect cost rate, and will place our schools in fiscal and contractual jeopardy;

NOW THEREFORE BE IT RESOLVED THAT:

1. The Bureau of Indian Affairs should be required to become as fiscally responsible with Congressional appropriations as contract schools must be with Federal funds and to locate, within existing resources, the funds needed to prevent a shortfall in the Indian Contract Support Fund for P.L. 93-638 contractors;

2. The BIA present its plan to Indian peoples for resolving the historical inequity of administrative funding for Indian contractors; and

3. The Bureau of Indian Affairs publish its plan for resolving the shortfall in the Federal Register for comment prior to implementation.

CERTIFICATION

The above resolution of the Association of Navajo Community Controlled School Boards was reviewed and approved on this, the 27th day of July 1982, by a vote of 6 in favor and 0 opposed, a quorum being present.

George Jim

George Jim, President
ASSOCIATION OF NAVAJO COMMUNITY
CONTROLLED SCHOOL BOARDS, INC.

7-29-82
Date:

A RESOLUTION OF THE
ASSOCIATION OF NAVAJO COMMUNITY CONTROLLED
SCHOOL BOARDS, INC.

Opposing the BIA-proposed revisions of regulations implementing P.L. 93-638 to apply P.L. 95-224 requirements for use of Grants instead of Contracts.

WHERAS

1. Changes in the Regulations governing Indian Self-Determination under P.L. 93-638, proposed by the BIA, are not required by P. L. 95-224, as evidenced by the fact that the Indian Health Service is not required to make similar changes to its Regulations for P.L. 93-638; and
2. These proposed changes are complex, are sometimes confusing, and will affect many areas of the existing Regulations in unclear ways; and
3. The BIA has not effectively consulted with national and regional Indian organizations, of which the ANCCSB is one, in planning these changes, as required in its current Regulations and in the Act; and
4. These changes shift authority over agreements between the United States and Indian Tribes and Organizations into the hands of a large number of minor BIA officials; and
5. The changes also increase the discretionary power of these officials to impose additional information requirements, and special terms and conditions upon Indian people; and
6. These officials are inexperienced and untried, and may not be as competent to deal with Indian Self-Determination as BIA's limited number of professional Federal Contracting Officers; and
7. Appeals from the decisions of these officials would go through the BIA administrative hierarchy under the proposed changes, instead of through an impartial professional Contract Dispute Board; and
8. The proposed changes also adopt "en masse" the general Grant Regulations of OMB; and
9. Indian people would be only one group among many interested in any future revisions of these Grant Regulations; and
10. The Secretary of the Interior has authority under P.L. 93-638 to waive any Contracting Regulation not appropriate to Indian Self-Determination, but has no authority under Law to waive Grant Regulations:

NOW THEREFORE BE IT RESOLVED THAT THE ANCCSB HEREBY:

1. Expresses its considered opposition to the above-cited aspects of the BIA-proposed P.L. 93-638 Regulation revisions; and
2. Respectfully requests the Senate Select Committee on Indian Affairs to exercise its oversight over the BIA, to require BIA to revise its decision to apply the provisions of P.L. 95-224 to the Indian Self-Determination Act.

CERTIFICATION

The foregoing resolution was presented and considered in detail by the members of the Board of Directors of the Association of Navajo Community Controlled School boards at a duly called meeting at Window Rock, Arizona (Navajo Nation), a quorum being present, and was passed by vote of 6 in favor and 0 opposed, this 27th day of July, 1982.

George Jim

George Jim, President
ASSOCIATION OF NAVAJO COMMUNITY
CONTROLLED SCHOOL BOARDS, INC.

7-29-82
Date:

Association on American Indian Affairs, Inc.

Office of General Counsel
600 New Hampshire Avenue, N.W.
Washington, D. C. 20037
Telephone: (202) 342-3500

ARTHUR LAZARUS, JR.
RICHARD SCHIFTER
General Counsel

Oliver La Farge, *President*
(1933-1963)

Alfonso Ortiz, Ph.D., *President*
Benjamin C. O'Sullivan, *Vice President*
Mrs. Lucy F. Covington, *Vice President*
Everett R. Rhoades, M.D., *Vice President*
Mrs. Alden Stevens, *Secretary*
John Simon, *Treasurer*
Steven Unger, *Executive Director*

RECEIVED JUN 24 1982

June 22, 1982

Ms. Betty Jo Hunt
Select Committee on Indian Affairs
United States Senate
Room 6313 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Ms. Hunt:

I am enclosing a memorandum which we have circulated to our tribal clients on the Indian Contract Support issue, an analysis of the Bureau's proposal developed by our office prior to the final BIA-ICS report, and a letter from an accountant quite knowledgeable in this area. I hope that these materials may be useful to the Committee in preparing for the hearing and I request that they be included in the record.

Sincerely,

S. Bobo Dean

Encls.

Fried, Frank, Harris, Shriver & Kampelman
Suite 1000
600 New Hampshire Avenue, N. W
Washington, D. C. 20037
(202) 342-3500
Cable "Steric Washington"
Telex 892406

Fried, Frank, Harris,
Shriver & Jacobson

Writer's direct number is

Our reference

June 21, 1982

MEMORANDUM NO. 82-18

Re: Bureau of Indian Affairs Plan for Indian Contract Support

Based on a study completed in March, 1982, the Bureau of Indian Affairs is planning to change the present system of providing "Indian Contract Support" funds to Indian tribal contractors under Public Law 93-638. These funds have been provided to assist tribal contractors in paying costs which are not covered by the BIA funding of the program under contract because they are for services provided at a higher level of BIA operations or because they are for essential contractors' expenses which are not incurred by the BIA in its direct operation of the program.

In the past the Bureau has stated that such payments, in addition to direct program funding levels, were mandated by Section 106(h) of Public Law 93-638. The Bureau plans to change the system by

(1) determining the amount of Indian Contract Support funding for each contractor through a BIA-wide program-by-program statistical formula, and

(2) adding Indian Contract Support funds only in the first year of operation so that in future years the distinction between program funds and ICS funds would be lost.

This approach reflects a lessening of the federal commitment to support Indian self-determination under Public Law 93-638. The failure to continue the separate identification of ICS funds means that it will become impossible to identify in future years the Secretarial funding level to which a tribal contractor is entitled as a minimum level under Section 106(h), and higher contract administrative costs may lead to reduced program funding and a deteriorating level of service.

In addition, development of the proposed statistical formula on a fair basis will present the Bureau with difficult technical and political problems. We understand that the Bureau does not propose to have the formula ready by F.Y. 1983 but does propose to lump ICS and program funding together in F.Y. 1983.

While some problems have arisen under the present system for a number of tribal organizations, the BIA study has suggested several solutions to those problems, including improved coordination among federal agencies and better training of federal and tribal staff. We feel that these proposals are sufficient to address current problems without the adoption of the radical change in the method of distributing ICS funds which also is proposed in the study.

We understand that the Bureau currently estimates a need for a supplemental appropriation of $6,000,000 in order to cover its ICS obligations to 638 contractors in F.Y. 1982. Unless these funds are appropriated by the Congress, the Bureau expects to be able to pay only eighty-five percent of such obligations.

The Senate Select Committee on Indian Affairs will be conducting on June 30, 1982, an oversight hearing on the implementation of Public Law 93-638 at which contractors under P.L. 93-638 may wish to present their views on this issue. Written comments for inclusion in the record of the hearing should be addressed to:

The Honorable William S. Cohen
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Attention: Ms. Betty Jo Hunt

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
A PARTNERSHIP WHICH INCLUDES PROFESSIONAL CORPORATIONS
SUITE 1000
600 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20037
(202) 342-3500
CABLE "STERIC WASHINGTON"
TELEX 892406

[illegible]

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

[illegible]

WRITER'S DIRECT NUMBER
202-342-3589

OUR REFERENCE
8027-1G

March 18, 1982

The Honorable Kenneth L. Smith
Assistant Secretary for Indian Affairs
U.S. Department of the Interior
Washington, D.C. 20240

Re: Indian Contract Support

Dear Assistant Secretary Smith:

On behalf of the tribes and tribal organizations which I represent I would like to thank you for the opportunity to participate in the March 11th meeting in Albuquerque on the draft AILC, Inc., report "Analysis of Bureau of Indian Affairs P.L. 93-638 Indirect Cost/Contract Support Policy Procedures and Practices." Your staff, ALIC, Inc., and the other participants should be congratulated on the constructive dialogue which developed at the meeting and which could well serve as a model process for the consideration of revisions in federal policy.

The purpose of this letter is to summarize in writing for the benefit of your staff the comments which I made on the report at the meeting. I understand from Mr. Garlock, Mr. Freeman and Mr. Krenzke that the draft is still subject to revision in the light of comments submitted prior to March 11th.

The most critical issue presented in the report is the question of the future arrangements for covering the costs to Indian tribes and tribal organizations of operating BIA programs under Public Law 93-638.

For six years the Bureau has utilized the Indian Contract Support Fund to pay tribal contractors (1) the additional administrative or overhead costs incurred by virtue of being a contractor and (2) for the cost of performing certain essential activities which are carried on by the Government at a level higher than the program to be contracted when Federal funding for such activities cannot practicably be reduced as a result of the contract. The Bureau has accomplished this purpose by paying from ICS funds the contractor's indirect costs determined either by the establishment of an overhead rate or the negotiation of a lump sum overhead agreement.

The draft report recommends that this approach be abandoned because (1) it is not a precise method of establishing the amount needed to defray the two types of costs noted above; (2) the use of a rate results in unforeseeable fluctuations in the demand for ICS dollars which make it difficult for the Bureau to estimate with reasonable accuracy its ICS need when it requests funds from the Congress, and (3) for certain tribes the use of the rate has produced serious fiscal problems for which tribal management is not responsible while for other tribes use of the rate has allowed an increase in ICS support which is alleged to be inequitable.

As to (3) above, such cases may have taken place but the draft report fails to document the extent to which either problem is widespread. As discussed below, the report proposes solutions which may largely eliminate the risk of fiscal difficulties (for example, "theoretical" over-recovery) through the establishment of reasonable coordination among federal agencies and consistency in their policies without any change in the present method of distributing the Bureau's ICS funds. In many instances (for example, through the lump sum guidelines for school contracts), excessive overrecovery of ICS funds has already been eliminated.

Points (1) and (2), however, may justify a change in the present system of distributing ICS funds subject to the qualifications noted below.

The crux of the report's proposed new method for distributing ICS funds is found in recommendations 4, 5, 6, 7, and 8 on pages 14 to 16. Essentially, the proposal is (a) to discard the use of indirect cost rates as a basis for an entitlement to ICS funds, and (b) to develop a statistical method or formula on a program-by-program basis by which such entitlement would be established, (c) to utilize ICS funds only for providing the extra funds established by the formula in the first year of contracting (or "granting" - assuming implementation of the proposed revisions in the 638 regulations) and (d) to provide after the first year of contracting a single funding level to a tribal contractor which would be identified in the BIA budget and which would include both those costs previously known as "direct program costs" and those which have been variously referred to as "incremental," "additional," "indirect," etc.

There are some significant dangers to tribal self-determination in the proposal and the same objectives can be achieved if the proposal is revised as explained below.

(a) Abandonment of use of rate. With the qualifications noted below, abandonment of the negotiated overhead rate as a means of distributing ICS funds may be acceptable. Tribes should still be entitled to negotiate indirect cost rates with a "cognizant federal agency" in accordance with established federal procedures for purposes other than determining an entitlement to ICS funds. Secondly, in the case of tribal organizations operating financial management systems which have been rated at level one or two by the Interior Department and which can make a showing that the rate does produce a distribution of ICS funds in line with the purpose of the fund, the continued use of indirect cost rates should be permitted.

(b) Formula funding of Indian Contract Support. In its favor this approach could lead to "equity" and to the reduction of time-consuming negotiation and paperwork for the government and for tribal organizations. On the other hand, the development of a statistical method of establishing ICS needs for a wide variety of programs which would be equitable for large tribes, "sophisticated" tribes, "unsophisticated" tribes, etc., will be a tough assignment. The educational funding formula mandated in Public Law 95-561 has not been fully refined and is still highly controversial. If "equity" is the goal, attention to the specific circumstances of particular contractors is indispensable. A "fair share formula" which is insufficiently thought out could, for example, eliminate the possibility of 638 initiatives for tribes, tribal organizations (such as tribal school boards and similar tribal instrumentalities) and Alaska Native villages which are small, remote, or for other reasons can be expected to have a high ratio of overhead costs to direct program costs. Such a formula would be perceived by Indians in such situations as an attempt to undercut the Congressional commitment to Indian self-determination contained in the Act. On the other hand, in some circumstances a formula might also discriminate unfairly against larger tribal organizations.

Consequently, this approach, if it is adopted, should be developed in full consultation with all federally recognized Indian tribal governments and all tribally sanctioned tribal organizations which would be affected by the change, including at a minimum publication for comments in the Federal Register as required by P.L. 93-638 and be the product of a careful, businesslike dialogue with authorized tribal representatives.

Clearly such a consultation process cannot be completed prior to October 1, 1983. We submit, therefore, that the consultation process on this proposal be begun as soon as possible with a target date for application of the formula in F.Y. 1984.

On the other hand, the alternative proposal explained by Mr. Sherfel of the Interior IG which, as we understand it, would utilize a "lump sum" method of establishing a fixed administrative base for tribal contractors, essentially utilizing and refining the lump sum negotiation method utilized in F.Y. 1982 under new OIEP guidelines, could be implemented in F.Y. 1983.

The advantages of this method are:

(1) It allows the negotiation of an amount which would be "incremental" or "additional." In other words, the expenses of the tribal contractor which are not adequately provided for by the Bureau's own program funds could be identified in the cost allocation plan.

(2) It avoids unexpected fluctuations in the amount of tribal recovery in dollars which may create problems either for the tribal contractor or for the Bureau (i.e. its inability to estimate future ICS needs) and which are rationally unrelated to any change in the need for administrative support dollars.

(3) This method allows consideration of the specific circumstances (for example, the minimum administrative funds for adequate operation of a program in the case of small tribes), thus avoiding a "broad brush" formula which fails to make provision for particular circumstances.

There are certain critical questions which need to be clearly and carefully answered, however, before tribes should be asked to utilize the new method. Perhaps the final report can answer these questions. The method must produce a system which can be utilized by tribal contractors in dealings with other funding sources besides the Bureau. As I understand Mr. Sherfel's presentation this is the case. In addition, the Government representatives who negotiate such arrangements must have clear guidance (as is now found for elementary and secondary education programs in the OIEP "Guidelines for Negotiating Lump Sum Agreements") as to those costs which may be classified as "administrative" and "additional" and, therefore, should be included in a 638 contract over and above the dollars available to the Bureau for operating the program at the level being contracted.

With these qualifications, the use of the Sherfel method may well go a long way toward resolving the problems which led to the initiative of this study. However, as noted above, I strongly urge that Indian tribes, such as the Miccosukee Tribe, which have neither abused the rate method nor encountered problems in its administration, should be permitted to continue its use. They should not be made to shift systems because of problems which have arisen elsewhere.

(c) and (d) Use of ICS Fund Only in First Year. The plan to inject ICS funds only in the first year of contracting and to finalize an overall funding level without further distinction between ICS dollars and direct program dollars could easily lead to the abandonment of the Bureau's commitment to implement section 106(h) of the Act so that tribes will not be required to absorb additional costs incidential to 638 contracting from the BIA program dollar.

For example, additional administrative costs due to changes in BIA 638 regulations requiring additional compliance activities (i.e. reporting, record-keeping and the like) would have to be absorbed by the tribal contractor from its program dollars. Additional or unusual legal expenses or accounting expenses resulting from federal audits or legal claims against the contractor and additional insurance needs would have to be met in the same way.

Furthermore, the elimination of the ICS fund as an ongoing source for "incremental" funding for 638 contracting inevitably must be viewed as being primarily a method for controlling the growth of the fund as a component in the federal budget. While Indians recognize the importance of economy in federal spending, the degree of the Administration's commitment to the self-determination policies initiated by Republican Administrations in the early 1970s must still be judged by its willingness to commit dollars to providing a reasonably viable basis for tribal operations of 638 programs. Federal budget economies which impair the ability of tribes to undertake or continue self-determination initiatives without reducing service levels cannot help but undermine tribal confidence in the integrity of the Administration's commitment to the Indian self-determination policy.

I urge that the authors of the report review carefully these considerations in revising their discussion of the "single fund" proposal. The analysis and recommendations in the draft report on the elimination of the "theoretical" or more properly "fictitious" over-recovery problem and the need for better training and communication on these issues on the part of federal agencies and tribal organizations are excellent and should be implemented.

I am authorized to state that these comments are submitted on behalf of the Miccosukee Tribe of Indians of Florida, the Metlakatla Indian Community, the Rock Point School and the Oglala Sioux Tribal Public Safety Commission.

Sincerely,

S. Bobo Dean

cc: Mr. Buffalo Tiger
Mr. Benjamin Barney
The Hon. Casey Nelson, Sr.
Mr. Robert Chasing Hawk
Mr. Gerald One Feather
The Hon. Harry D. Early
Mr. Carl Levi
Mr. Ronald Tedrow

RECEIVED APR 2 - 1982

McGladrey Hendrickson & Co. Internationally DUNWOODY ROBSON McGLADREY & PULLEN
CERTIFIED PUBLIC ACCOUNTANTS

April 19, 1982

Robert Chasing Hawk
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, South Dakota 57625

Dear Mr. Chasing Hawk:

Thank you for the opportunity of allowing me to participate as a team member at the March 11th Albuquerque meeting concerning the review of AILC, Inc.'s draft report "Analysis of Bureau of Indian Affairs P.L. 93-638 Indirect Cost/Contract Support Policy Procedures and Practices". The meeting was informative with participants from the BIA Area Offices and Central Office, the Department of the Interior, Office of the Inspector General, 638 contractors (primarily tribes and contract schools), elected tribal officials, and attorneys and accountants representing tribal organizations.

I am summarizing for your benefit my observations concerning some of the recommendations contained in the draft report. S. Bobo Dean has already provided you with a summary commenting on the salient recommendations contained in the report and also pointing out some pitfalls in those recommendations which if implemented without careful study and consideration may not resolve the issue of the delivery of indirect cost and contract support funds on 638 grants and contracts. I concur with Mr. Dean's analysis so my comments will be concerned primarily with administration of contract support and indirect cost funds at the tribal contractor's level and raise questions regarding the proposed change in delivering those funds by the BIA.

The report provides an in depth discussion on various topics related to the problems associated with contract support and indirect costs. These topics included a definition of indirect cost; differentiation of contract support and indirect costs; separate funding for indirect costs; treatment of indirect costs by other agencies; overrecovery and fixed rate/carry forward computation; lump sum payments for contract schools; and, financial losses attributable to contract support/indirect cost problems. The report also contains recommendations to solve the contract/indirect cost support problem.

The report states that "the root of the problems and difficulties being encountered,...lies in the decision to base Contract Support funding on tribal indirect costs and distribute Contract Support funds on the basis of tribal indirect cost rates". The recommendations in the report are "...based on the assumption that this approach will be changed". The proposed changes in the delivery of contract support funds are contained in the following recommendations:

- Discontinue the use of Contract Support funds for tribal indirect costs.
- Develop a statistical formula for allocating contract support funds for each contracted program.
- Use Contract Support funds for additional costs incurred only in the first year of contracting.
- Include funds for both direct and indirect costs in all 638 grants and contracts and discontinue the use of separate indirect cost funds.
- If a separate budget item for contract support is continued, it should be used for only incremental costs until such costs can be incorporated into the regular budget.
- Implement the initial changes for FY 1983 by eliminating the distribution of contract support funds through indirect cost rates.

The discontinuance of using Contract Support funds for indirect costs; developing a formula for allocating such funds; and consolidation of direct and indirect costs as one contract amount has some serious limitations. Before 638 contracting was implemented, most tribes including Cheyenne River had not established indirect cost rates to recover central support services such as accounting, payroll, personnel management, etc. These types of activities have always been necessary but such costs were previously borne by tribal funds or classified as direct contract costs. The elimination of contract support funds to pay for activities which provide these support services to 638 programs may diminish the tribe's ability to continually maintain a financial and administrative management system which meets the standards promulgated by Part 276, Title 25 of the Code of Federal Regulations. This factor should be carefully considered before it is actually implemented.

The consolidation of direct and indirect costs into one contract amount could create a situation similar to the one mentioned above. Additionally, it is conceivable that program administrators at both the BIA and tribal level would want the entire amount classified as program services. While it is desirable to maximize the amount for services to people and minimize the amount for administration, the supportive activities still need to be performed. Adopting a policy of consolidating the funds may force a tribe to return its financial and administrative management system to "pre-638" days where such costs would be borne by the tribe or made a direct cost. The disadvantages of reverting back to "pre-638" may result in less control and more inefficiency. For example, there could be a "duplication of effort" from similar activities being performed at both the central level and at the program level. If transactions are approved, executed, recorded and reported by one individual at the program level, unintentional or intentional errors or irregularities occur which may go undetected. Consequently, proper control does not exist. Separation of duties would help insure adequate controls and could be best achieved through separate identity of the funds.

The use of a statistical method for allocating contract support funds has some merit and could be an equitable approach. However, to achieve equity between large tribes and small tribes a complex formula would have to be developed and tested. Those who would receive less under a formula method than they are currently receiving would consider the formula method unfair. Many variables would have to be considered in developing a formula and should include factors such as population, per capita income, population density, land base and primary service area. Other items to consider may be a tribe's capability to obtain revenue from sources other than grants and contracts and its orgainzational structure. Before a formula method would be implemented, questions would have to be answered concerning minimum funding for tribes. Also an analysis should be made (by tribe) comparing amounts received under the formula method to amounts actually received under the present system. The formula should not be endorsed or implmeneted if such a study is not available for review by the tribes.

Generally, these recommendations parallel the approach used by other agencies in providing direct and indirect costs to tribal contractors. However, it appears that the use of this approach would benefit the Bureau of Indian Affairs by placing a ceiling on total funding (direct and indirect) of 638 programs and controlling contract support funds. No one can argue with BIA in trying to better manage and allocate its scarce resources (funding) for competing needs, but this should not be done in a manner where services provided through 638 contracts would be diminished. The implementation of policies and procedures which would effectively reduce funding would clearly be in violation of the intent of Indian self-determination. Therefore, the impact of implemeting any proposed changes contained in the report should be carefully considered before they are placed in practice.

The recommendations also suggest that initial changes should begin in FY 1983. This schedule appears optimistic considering what must be done to implement the changes. These changes should be tested to insure their viability as alternatives to the present system.

Mr. Lee Sherfel of the Department of the Interior, Office of Inspector General, explained an alternative to the delivery of Contract Support funds through a lump-sum method rather than through the application of a rate. The pitfall with a rate is the assumption that indirect costs are incurred proportionally as direct costs are incurred. This is not true. In practice, indirect costs are usually fixed and do not change as direct costs are incurred. The advantages of negotiating a lump sum include:

- Cash flow is improved because overhead amounts are available as the money is needed and not as direct costs are incurred.

- The lump sum method removes the false assumption that indirect costs are proportional to direct costs.

- Budgeting central service support costs is easier and should require less monitoring.

Although the lump sum method has definite advantages over the use of a rate, there are some questions which need to be resolved:

- OASC-10 indicates that lump sum payments can be used in lieu of indirect cost rates "where the benefits derived from a grantee department's indirect services cannot be readily determined as in the case of a small self-contained or isolated activity". Will other agencies accept this approach?

- As programs are added during the period a lump sum agreement is in effect, can the agreement be amended to include additional funds to cover a possible increase in support costs?

- Recognizing that payments made by the lump-sum method may be different than actual overhead (indirect) cost, would there still be some form of carryforward adjustment in subsequent years?

- If some funding agencies still do not participate in the lump sum method, will this violate the cost principles because the underrecovery of costs from one contract cannot be shifted to another grant or contract?

The draft report does outline recommendations which can alleviate some problems associated with contract support and indirect costs. But as I previously mentioned any changes which will impact funding to the tribe should be reviewed carefully so a similar situation does not occur again.

I will be glad to discuss the draft report with you and answer any questions you may have concerning this issue. I am available to assist you in analyzing any changes being proposed by the Bureau of Indian Affairs and what impact it may have on the tribe. I can work with you in developing the tribe's response and views on these matters.

Sincerely,

RONALD G. TEDROW, CPA

RGT:st

cc: Mona Cudmore
Barbara Twiss
S. Bobo Dean

Association on American Indian Affairs, Inc.

Office of General Counsel
600 New Hampshire Avenue, N.W.
Washington, D. C. 20037
Telephone: (202) 342-3500

ARTHUR LAZARUS, JR.
RICHARD SCHIFTER
General Counsel

Oliver La Farge, *President*
(1932-1963)

Alfonso Ortiz, Ph.D., *President*
Benjamin C. O'Sullivan, *Vice President*
Mrs. Lucy F. Covington, *Vice President*
Everett R. Rhoades, M.D., *Vice President*
Mrs. Alden Stevens, *Secretary*
John Simon, *Treasurer*
Steven Unger, *Executive Director*

RE [illegible] 82

August 17, 1982

The Honorable William S. Cohen
Chairman
Select Committee on
 Indian Affairs
Room 6313 Dirksen Senate
 Office Building
United States Senate
Washington, D.C. 20510

Attention: Mr.Timothy C. Woodcock

Dear Mr. Cohen:

On behalf of the Association on American Indian Affairs, I am pleased to submit the enclosed statement to express our concern at the failure of the Bureau of Indian Affairs to respect the rights of American Indian tribes in regard to Public Law 93-638.

We ask that the Committee include our statement in the permanent record of the oversight hearing held by you on this issue on June 30, 1982.

May I again express to the Committee our deepest appreciation for your continuing concern that the rights of American Indian children, families, and tribes be fully respected and implemented by the Bureau in regard to Public Law 93-638.

Sincerely,

S. Bobo Dean

S. Bobo Dean S/BDm

Attachment.

STATEMENT ON BEHALF OF
ASSOCIATION ON AMERICAN INDIAN AFFAIRS

BY S. BOBO DEAN, ESQ.,
OFFICE OF GENERAL COUNSEL
AT OVERSIGHT HEARING ON PUBLIC LAW 93-638
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
June 30, 1982

Mr. Chairman, my name is S. Bobo Dean. I am associated with the firm of Fried, Frank, Harris, Shriver and Kampelman, which is General Counsel to the Association on American Indian Affairs. I have been authorized to submit the following statement on behalf of the Association.

The Association is a non-profit corporation which is the largest Indian-interest organization in the United States with a membership of 50,000 consisting of Indians and non-Indians. It has taken a major interest in Indian child welfare and education needs for many years and in assisting Indian tribes in achieving self-determination.

The Association conducted studies in 1969, 1974, and in 1976 at the request of the Congress, of the off-reservation placement of Indian children which led to the enactment of the Indian Child Welfare Act and also submitted testimony in support of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, as amended by the Education Amendments of 1978, Pub. L. No. 95-561. For several years after enactment of P.L. 93-638, the Association operated a technical assistance project for the BIA under which legal representation was provided to tribal organizations in negotiating contracts for the administration of Bureau programs under that Act.

The purpose of this statement is to express the Association's concern at the failure of the Bureau of Indian Affairs to respect the rights of Indian children and their families and communities to a locally-based educational system which provides a sound education in safe facilities, close to their homes, so Indian children can live with their families while they learn. The Association was encouraged by the enactment of section 1130 of P.L. 95-561 which provides that it

> shall be the policy of the Bureau, in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education.

It was also pleased that the federal Indian education policies promulgated by the Secretary of the Interior pursuant to section 1133 of that Act "to serve as the foundation for future Bureau actions in education" expressly provided that the Bureau shall "promote, respect and defend the cohesiveness and integrity of the family," that Indian children shall have "the opportunity to attend local day schools and other schools of choice," that the Bureau shall "promote the community school concept," and that the Bureau shall "provide day and residential education services as close to an Indian or Alaska Native student's home as possible." See 25 C.F.R. §31a.4.

Notwithstanding these Congressional and regulatory statements, however, we find that the Bureau has taken and proposed actions which undermine the availability of adequate educational programs in an Indian child's own home community. This problem is particularly acute with reference to isolated rural Indian communities. A day school elementary education for such children often and necessarily means a relatively small school. The Association has worked closely with a number of such communities (the Havasupai Tribe, the Pyramid Lake Paiute Tribe, the Miccosukee Tribe and the Black Mesa Navajo Community) to assist them in providing adequate educational programs for their children without separating the children from their families. Although in the past, with AAIA assistance, these Indian communities have been able to operate local day schools financed by the Bureau under Public Law 93-638, they face critical difficulties in continuing these programs in future years.

First, Congress directed that "size of the school," "isolation of the school," and "the cost of providing academic services which are at least equivalent to those provided by public education in the State in which the school is located" should be considered by the Secretary in determining the ISEP funding formula. See 25 U.S.C. §2008. Nevertheless, as the Bureau has publicly admitted, the Indian School Equalization Program regulations issued by the Secretary under section 1128 of Public Law 95-561 do not provide for adequate funding to operate small schools.

Moreover, over two years ago, the Bureau's consultant, the National Conference of State Legislatures, recommended adjustments in the ISEP formula to increase the instructional small school adjustment and the transportation factor in the formula. Both changes would provide more adequately for the financial support of small, rural schools, such as Miccosukee and Black Mesa. Yet, despite the Bureau's educational policies which seek to provide for a school "as close to home as possible" and emphasize the importance of the day-school option for children, parents and community, one BIA official has stated that the present ISEP formula not only does not adequately fund small schools, but it also was intended to discourage "the mini-school."

No action has been taken by the Bureau to revise the formula, and the Bureau currently explains the failure to do so on the grounds that the minimum education standards for Bureau schools have not been issued. These standards are required by section 1121 of Public Law 95-561, which mandates the Secretary to propose the standards within eighteen months of November 1, 1978. They have never been proposed. We are disturbed that the Bureau's failure to correct the ISEP formula to adequately address considerations mandated by the Congress is a violation of an express Congressional directive.

Second, since 1978 the priority which has been given to Indian education matters by the Congress simply has not been shared by the Executive Branch. As a consequence, some 100 schools (or about 35% of the total number of BIA-funded schools) which have been established to provide a day-school education for Indian children in isolated rural communities, are grossly under-funded. In addition, the establishment of new schools serving small, isolated Indian communities in accordance with the wishes of parents and Indian tribes has been rendered impracticable.

With respect to new school starts in small, isolated communities under Public Law 93-638, the Association also is concerned that certain changes proposed by the Bureau in the regulations under that Act seem designed to discourage such schools. While the Bureau claims that the change in regulations is required by the Federal Grant and Cooperative Agreement Act, our analysis of that Act finds no such requirement.

For example, we note that new language is proposed in 25 C.F.R. Part 271 to establish additional hurdles for a BIA school contract in the case of new school starts. While we understand that it is reasonable for the Bureau to establish regulatory standards for new school starts, we note that the Bureau is imposing overlapping, and more stringent, requirements in a number of areas which are already covered for all 638 applications by §271.15. For example, the present regulations provide that "no higher standards with regard to buildings, facilities, or equipment shall be applied to tribal organizations than have previously been applied to the Bureau," but the proposed standard for new school starts would be a new requirement that facilities be "adequate to support the program."

Similarly, under the present regulations, community support is presumed under §.271.15 if the tribal governing body requests the contract and the Bureau must demonstrate "that there is a lack of support for the contract and that the lack of support will result in unsatisfactory services." In contrast, in the proposed §271.72 the Bureau is directed to consider "whether there is an apparent desire for the new school start ... on the part of the Indian tribe and/or community to be served." If the proposed language means something other than the present §271.15, the intent is wholly unclear. We suggest the proposed regulation is unnecessary, redundant, and possibly harmful.

Again, with respect to new school starts, under the proposed regulations, the Bureau would be required to consider whether there are "other adequate education alternatives currently available to the students to be served by the new school start." What are the standards of adequacy that are to be applied? The Association is disturbed that at no point in proposed §271.72 is there any cross-reference to the federal Indian education policies contained in 25 C.F.R. Part 31a which, according to law, must now "serve as the foundation for future Bureau actions in education." As already noted, the application of these policies would encourage new school starts to assure a day-school operation, the community school concept and education services as close to a child's home as possible. Any new special standards to be applied in the evaluation of new school starts should reflect and be consistent with these policies.

As a final objection to new school start regulations, we note that the Bureau will consider whether "start-up costs are disproportionate to the numbers of students to be served or the potential benefits of the program, as compared with the start-up cost of other applicants." We find no guidelines as to how such disproportion is to be determined. Certainly, the Bureau must weigh the value to a child of the maintenance of ties with its family and community, but can such values be allocated a dollar value and compared with monetary costs?

Third, the Bureau also is proposing to make far-reaching changes in 25 Code of Federal Regulations Part 271, which will decrease the tribal bargaining leverage in 638 negotiations, prompt the Bureau to insist on special, more stringent conditions in 638 grants than are now permitted in 638 contracts, and strengthen the hand of the Bureau when it decides to decline a 638 application. For example, the present language stating that the Bureau has "the burden of proof" when it proposes to decline a tribal application is eliminated by the proposed changes.

Fourth, the Bureau also is proposing to revise Part 274 governing construction grants for contract schools not previously operated by the Bureau. These revisions impose a numerical minimum of 25 students per school "through grade 8" and 50 for grades 9 through 12. We are relieved that the rumors of a minimum requirement of 150 students per school have proved to be untrue. However, the proposed minimums do raise serious questions. Many existing Bureau elementary schools do not go as high as the eighth grade and enroll fewer than 25 children. Is the same minimum to apply to a K-3 school as to a K-8 school? If so, the minimum enrollment requirement may result in continued placement of very young children in boarding schools when a small elementary school would otherwise be an educationally sound, not to mention socially desirable, alternative.

Fifth, the Association continues to receive complaints from Bureau schools concerning long delays in receiving funds to which they are entitled. We understand that the final allocation of funds to BIA schools for F.Y. 1982 was not distributed until May, although Congress appropriated the funds in December 1981. While the unavailability of a funding level from October to December was due to Congressional inaction, the failure of the Bureau to make distributions from December to May was entirely within the control of the Executive Branch. Such funding uncertainties and delays are inexcusable, and they impose particularly severe hardships on small schools without other funding sources.

Finally, the Bureau has also failed to solve the problem of providing adequately for indirect costs for contract schools. The continued controversy over this issue and the apparent disagreements as to how it should be resolved between various divisions of the Bureau and the Interior Department's Inspector General are quite difficult to understand. Most recently, we have been told that one Bureau Area Office has received a "directive" that the BIA Guidelines for Lump Sum Indirect cost Negotiations have been "revoked" although no responsible official in the BIA Central Office is aware of any such directive. Again, it is the smaller contract schools, with a normally high proportion of overhead to program costs and no other sources of revenue, which bear the brunt of such bureaucratic confusion.

We urge that the Senate Select Committee on Indian Affairs exert its influence to encourage respect and full implementation by the Bureau of the existing legal rights of Indian communities to develop educational programs in safe, adequate facilities within the community, with the option of a day-school education for all American Indian children.

Specifically, the Association recommends that the following steps be taken by your Committee to diminish the threat which Bureau actions currently present to the achievement of the Indian goal of educational self-determination:

(1) The Federal Grant and Cooperative Agreement Act should be amended to make clear that it does not repeal by modification any provision of Public Law 93-638 or require the modification of any of the regulations of the Secretary of the Interior implementing that Act.

(2) The Committee should encourage the Senate Appropriations Committee to insist on the continued appropriation of a separate fund from which start-up costs and additional contract administrative costs for 638 contractors can be paid. If the Bureau continues to move toward the elimination of the Indian Contract Support fund and the provision of a single "guaranteed" funding level for 638 contracts without distinguishing between the direct program level and additional contract administrative funding, §106(h) should be amended to make explicit the necessity of providing 638 administrative funds in addition to the funding level of the Bureau-operated program.

(3) The designation of knowledgeable central office staff personnel or outside contractors (along the lines of the Association's project noted above) to serve as "ombudsmen" for tribal organizations seeking to assert their rights under Public Laws 93-638 and 95-561 would also be desirable. This approach proved useful to tribes in the earlier years of the implementation of Public Law 93-638 but has been abandoned by the Bureau in recent years. The Association recommends that the Committee seek the re-establishment of this form of assistance to Indian tribes by legislation, if necessary.

I appreciate the opportunity of presenting the Association's views on this important issue in Indian affairs.

Senate Indian Affairs Committee
Oversight Hearings on P. L. 93-638,
Indirect Costs, Grants and Contract Administration
9:30 a.m. - Room 5110, Dirksen Senate Office Building
Wednesday, June 30, 1982

Testimony:

Gary W. Donald, Chairman
Bois Forte Reservation Business Committee
Nett Lake, Minnesota 55772
Telephone: 218/757 3261

INDIRECT COSTS:

The Bois Forte (Nett Lake) Band of Lake Superior Chippewa Indians is located in northern Minnesota approximately forty miles south of the United States-Canadian border. The band enrollment of the Bois Forte (Nett Lake) Reservation is approximately 1,700, which includes 990 people residing on or near the reservation. The Bois Forte band has actively been acquiring and administering federal grants and contracts since the late 1960's in order to provide services to its members. However, the award of such grants and contracts to the Bois Forte Band has lead to a situation where the band is in serious financial difficulty due to the indirect costs associated with them. This stems from the following situation:

For Indian tribes that have an indirect cost rate, that rate is applied to grants and contracts--approved indirect cost percentage rate times the amount of direct costs of grants and contracts--and this amount is the theoretical indirect cost recovery. However, few grants and contracts allow the full recovery, so the actual recovery is much less than the theoretical recovery. The tribe is still held accountable as if it had received the theoretical recovery and the indirect cost rate for the following year is reduced by the percentage to reduce the indirect cost income to make up the difference between the theoretical and actual recoveries for the previous year.

Some programs contain legislation that place restrictions on reimbursement of costs and some programs are subject to laws that limit the amount of indirect costs that may be charged against them. Other programs negotiate lesser indirect costs rates when there is no limitation or restrictions imposed. But by accepting the indirect cost rate established pursuant to the indirect cost proposal, the Bois Forte Band agrees that it is its responsibility to collect the full amount of indirect costs applicable to each of its programs and projects, that any such costs not collected must be funded with its own funds, and that for the purpose of computing the amount of the carry-forward for the next year, it will be assumed that all indirect costs applicable to all programs have been recovered.

Year after year of covering the differences between the actual indirect cost expenses and the amount recovered, coupled with a smaller indirect cost rate each year, and in the case of the Bois Forte Reservation, where a rate was not negotiated for two years, 1979-80 - 1980-81, leads to more use of tribal funds to administer federal programs. State and local governments have sources of revenue to cover these costs. The Bois Forte Reservation does not have unrestricted resources to fund the indirect costs not reimbursed through the indirect cost rate. As a result, the Bois Forte tribe, along with many tribes and organizations are on the verge of financial collapse.

The Bois Forte Band, for FY-79, '80, and '81, has had indirect cost expenditures of $702,483.00 and has received $285,484.00 indirect cost reimbursement for a deficit of $416,999.

These funds were used to pay costs of administering grants and contracts including staff and general administration expense that meet the regulations and requirements for the indirect cost program in compliance with Indirect Cost Manual OASC-10.

We are requesting the Senate Committee on Indian Affairs to provide legislation that would authorize the Secretary of the Interior to reimburse the Bois Forte Band for indirect costs expenditures in the amount of $416,999.00 for FY-79, '80, and '81, for the reasons previously stated in this document. We further request the Senate Committee on Indian Affairs to seek changes to the indirect cost programs that would make equal expenditures and recoveries for Indian tribes.

We further request that the Bureau of Indian Affairs policy of allowing only 50-70% of indirect cost recovery of grants and contracts be increased to 100%.

We also oppose the B.I.A.'s recommendations that the B.I.A. phase out Contract Support funds (incremental costs which are costs associated with getting and operating a contract). This change would mean that all indirect costs in the future would be funded out of the program monies as opposed to add-on to program funds. An example of this is as follows:

A. Old System		B. Proposed change
Contract budget	$50,000	$50,000
Bois Forte Indirect Cost	$11,900	$11,900 taken out of project
Total contract amount	$61,900	$50,000

THE CONVERSION OF CONTRACTS TO GRANTS UNDER P.L. 93-638 BUREAU OF INDIAN AFFAIRS GRANTS AND INDIRECT COSTS

I would like to make reference to a paragraph in the Act P. L. 93-638, 93rd Congress, S. 1017, January 4, 1975, Declaration of Policy, Section 3, Paragraph G., "The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in planning, conduct, and administration of those programs and services."

It is very clear what the objectives of 93-638 are and what Indian people stand to gain by an efficient and effective system of dissemination of provisions allowed by the Act. Over the past couple of years, the Bureau of Indian Affairs has taken the initiative of reorganizing and also initiated steps in changing contracts to grants and 638 regulations pertaining to what Indian tribes can do in obtaining self-determination.

The conversion of contracts to grants as we are aware will perhaps be in effect on October 1, 1982. Obtaining programs and services under 638 grants has very limited advantages, but in my opinion, the disadvantages outweigh the advantages.

The Bois Forte Band is in opposition to the proposed Bureau of Indian Affairs policy change from contracts to grants for the following reasons: We contend that the proposed change will defeat the initial purpose of P. L. 93-638. That is to give Indian tribes the basic and sovereign right to self-determine their own destinies.

Most changes in rules and regulations would allow the Bureau of Indian Affairs to make decisions without tribal input, thereby, removing much of the tribe's local authority. The following are examples:

Copyrights: Changes would not allow tribes to use royalties derived from copyrights to be used at their discretion. Tribes would only be allowed to use royalties for program services.

Property: Under the present 93-638 system, the government is obligated to furnish property. Change would give authority/decision not to transfer property. In effect, the government will not be required to grant property for tribal requests.

Disputes: New policy tribe would lose right to appeal disputes.
Changes in Contract: Under new system, tribes would lose right to challenge Bureau of Indian Affairs' decisions.

Limitation of Costs: New system would require tribes to complete contracts, at their own expense, and government would also impose penalties if tribe did not comply.

Cancellation of Contract: Under new system, the Bureau of Indian Affairs would/could impose new reasons for cancellations of contracts.

OFFICE OF THE TRIBAL CHAIRMAN

JUANITA L. LEARNED
TRIBAL CHAIRPERSON

Concho Office: (405) 262-0345
Residence Phone: (405) 346-6972
Box 38
Concho, Oklahoma 73022
(405) 236-4031
1-800-522-3577

June 28, 1982

The Cheyenne-Arapaho Tribes of Oklahoma are submitting their testimony on the implementation of P.L. 95-224 and its possible effects on tribal programs. We believe in the concept of block grants as originally conceived by the Bureau of Indian Affairs. This mechanism would allow for the valid and practical application of the intent of P.L. 93-638.

There are, however, some areas that the Tribes' take exception to in the regulations of 638 and 224 that will be imposed on us if our comments are not made and noted.

For this reason, on behalf of our governing body, I am submitting the following comments.

Sincerely,

Juanita L. Learned

Juanita L. Learned, Chairperson
23rd Business Committee

The Cheyenne-Arapaho Tribes propose that, in accordance with our direct government to government relationship with the U.S. Government (as recognized by P.L. 93-638), we enter into negotiations with the U.S. Government on the question of grants and contracts and their requirements.

As a sovereign government, we do not consider ourselves automatically required to adhere to administrative regulations which are often developed for the state and local governments. Especially those regulations that mention tribal governments as an aside.

The Bureau of Indian Affairs had the foresight to begin the drafting of regulations that would conform more easily to P.L. 95-224. We maintain that this foresight would have been better spent by requesting an OMB exception to the Act before January 1981 as provided for in this act.

Many tribes are not financially capable of keeping a grant status classification as referenced in the act. In 271.41 of the 638 draft regulations, the Bureau of Indian Affairs has the determining power to classify a tribe's financial system as unstable. "Unstable" can have many different connotations. If a tribe is forced into a cooperative agreement approach because of this determination, more federal involvement will then follow. This is in direct conflict with the why of P.L. 93-638.

We would caution the administrative branches of the U.S. Government to remember that tribal governments are sovereign entities. In accordance with the U.S. Government's judiciary and legal responsibilities to the Cheyenne-Arapaho Tribes, we request that the U.S. Government recognize that the tribal government is valid and has its citizen's interests and welfare as its top priority, as the U.S. Governments regards its own citizens. We also remind the administrative branches of the U.S. Government to remember that the U.S. Government is obligated to provide services to the Cheyenne-Arapaho Tribes with the stipulation that the tribe be able to administer those same services for its self-determination without undue interference from the U.S. Government.

Through the maze of regulations and policies that govern or will govern tribes, the Tribes are losing their unique status as sovereign nations. By executive order of the President, OMB has proposed a change in the A-95 review procedure. Tribes would be put under A-95 review procedure through the state clearinghouse. So as we are here testifying today, steps are being taken to include the Tribes in at least part of the requirements of P.L. 95-224.

Dibé Yázhí Habitiin Ólta' Inc.
Borrego Pass School
P.O. Drawer A
Crownpoint, New Mexico 87313

Phone
505 786-5237
786-7211

August 2, 1982

Donald D. Creamer
Executive Director

Senator William W. Cohen, Chairman
Select Committee on Indian Affairs
Washington, D.C. 20510

Reference: Oversight hearing record, June 30, 1982

Dear Senator and Committee Members:

We thank the Select Committee for leaving the record open in order to give Indian people and organizations such as ours a chance to review the complicated issues, and express informed opinions.

We are in posession of a copy of the draft regulations pending publication for comment, which amend BIA regulations for P.L. 93-638, dated May 21, 1982. We wish to comment upon some of the changes these proposed regulations would make in the system under which we now control our own school.

1. The change from contracting to grant-making appears needless, and we suspect that BIA's claim that it is required to make the change by P.L. 95-224 is a deception. In his February 25, 1982, memorandum to BIA on the subject, the Interior Solicitor clearly states that "we concurred with BIA" in the position that assistance instruments reflect the basic legal relationship between BIA and tribal goverments under 638. This, together with the fact that Indian Health Service does not hold that P.L. 95-224 applies to its 93-638 Self-Determination program, strongly suggests that BIA's lawyer is simply coming up with legal window dressing to support what BIA had already decided to do, for other reasons.

2. This change in instrument masks a much more profound shift of power within the BIA under the proposed regulations, from administration of 638 initiatives by professional Contracting Officers, to administration by BIA Executive Service Officers, at all levels. This shift tends to make the program much more of a "political patronage" system, under which BIA's old line bureaucrats will have greater power to manipulate Tribal officials, and fewer constraints on that power, than at present. It appears to be a simple

Board of Directors
George Jim, Chairman
Bessie Platero
Tommy Yazzie
Nancy Craig
Thomas Barbone
Glen Loley
Grace Bruce

"power grab" by the very people who have the most to lose if 638 succeeds.

3. Many of the minor changes in wording reduce or eliminate existing safeguards in the system against BIA officials' abuse of power, or extend the degree of discretion afforded these bureaucrats in the use of their power.

For these reasons, we urge the Select Committee bluntly to prevent BIA from implementing these changes, by any means at your disposal.

At the same time, we note that many of the changes with which BIA is trying to "sell" the revisions, such as greater flexibility simpler paperwork, etc. could much more easily be implemented under contracting procedures, than under grant-making procedures. The Act gives the Secretary of the Interior virtual carte-blanche to waive any contracting regulation which is inappropriate to Indian Self-Determination, but we can find no similar authority to waive grant regulations. If BIA were really sincere in wanting to simplify, it could take the beneficial rules out of A 87, and A 102 and all its attachments, and put them in the 638 contracting regulations at will. But it has no power to amend these OMB grant regulations at all, nor to prevent future amendments to the OMB regulations which are hositile to Indian interests.

Consequently, we believe that the Select Committee should literally require BIA to use the power it has, within the existing system to simplify Self-Determination for Indian people. It should do so in the contracting process, which the Act clearly identifies as appropriate to Self-Determination, and not in some distant "greener pasture" of grant-making.

Again, thank you for the Committee's genuine seeking for Indian opinion in these matters. Your clear concern and integrity in upholding the U.S. Government's commitments to conquered nations is both honorable and deeply respected.

Board of Directors,
Dibe Yazhi Habitiin Olta, Inc.
(Borrego Pass School Board)

George Jim
George Jim, President

Tommy Yazzie
Tommy Yazzie, Member

Glen Lokey, Sr., Vice President

Bessie Platero
Bessie Platero, Member

Grace Bruce
Grace Bruce, Secretary

Thomas Barbone
Thomas Barbone, Member

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
A PARTNERSHIP WHICH INCLUDES PROFESSIONAL CORPORATIONS
SUITE 1000
600 NEW HAMPSHIRE AVENUE, N. W
WASHINGTON, D C 20037
(202) 342-3500
CABLE "STERIC WASHINGTON"
TELEX 892406

[illegible]

COUNSEL

* PROFESSIONAL CORPORATION

FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON

[illegible]

WRITER'S DIRECT NUMBER IS
202-342-3589

OUR REFERENCE

June 29, 1982

RECEIVED JUN 29 1982

Betty Jo Hunt, Esquire
Staff Attorney
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: Oversight Hearing on Public Law 93-638

Dear Ms. Hunt:

Enclosed herewith is a statement on problems in contracting with the Indian Health Service under Public Law 93-638 which have been encountered by a number of our tribal clients. I would be grateful for the inclusion of this statement in the record of the hearing.

I am also enclosing a copy of our draft memorandum to our clients on the BIA's proposed changes in the 638 regulations. The memorandum is not yet final as the Bureau has not yet published the changes.

I have checked in red issues about which you may wish to question IHS and BIA witnesses. Do not hesitate to call if you have questions on these matters.

Sincerely,

S. Bobo Dean

Encls.

STATEMENT OF S. BOBO DEAN, ESQ.,
ON BEHALF OF
THE BRISTOL BAY AREA HEALTH CORPORATION,
THE NORTON SOUND HEALTH CORPORATION,
THE MISSISSIPPI BAND OF CHOCTAW INDIANS,
THE METLAKATLA INDIAN COMMUNITY,
THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
BEFORE THE OVERSIGHT HEARING ON PUBLIC LAW 93-638
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS,
June 30, 1982

Mr. Chairman, my name is S. Bobo Dean. I am associated with the law firm of Fried, Frank, Harris, Shriver and Kampelman and have represented a number of Indian tribal organizations in negotiating contracts with the Indian Health Service under Public Law 93-638. I have also served as a consultant to the Indian Health Service on matters involving tribal rights under the Act. I have been requested by several of our clients which are identified below to submit this statement for the purpose of identifying the most serious problems which these tribal organizations are currently facing in their effort to achieve Indian self-determination in health matters pursuant to Public Law 93-638. While the particular instances noted in this statement may relate to particular tribes, the overall problems identified are of concern to all of our clients and affect the rights under existing federal law of Indian tribes throughout the United States.

The most serious problem encountered by our clients in negotiations with the Indian Health Service has been the estbalishment of a contract funding level in accordance with federal law and elementary prudence and common sense. Public Law 93-638 expressly provides in section 106(h) that the

> amount of funds provided under the terms of contracts entered into pursuant to sections 103 and 104 of this Act shall be not less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract, provided, that any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract.

25 U.S.C. §450j(h).

It has proved extremely difficult for our clients to obtain sufficient information from the Indian Health Service to establish the amount to which they are entitled under section 106(h) and, even when agreement has been reached with the Indian Health Service as to contract funding levels, to ensure IHS compliance with its commitments.

For example, our client, the Bristol Bay Area Health Corporation negotiated a contract under Public Law 93-638 with the Indian Health Service for the operation of the Bristol Bay Area Hospital in F.Y. 1981. IHS and BBAHC agreed that IHS would provide a funding level for F.Y. 1981 including the F.Y. 1980 funding level plus the seven percent increase requested by IHS to cover inflationary cost increases in its F.Y. 1981 budget request (subject to adjustment in case Congress provided more or less than the requested increase).

Far into the contract year (i.e., September 1, 1981) our client learned from the Indian Health Service that the contract amount had been based on the F.Y. 1980 planning amount for the hospital, not on the actual cost to the Secretary of operating the hospital in F.Y. 1980 which was substantially in excess of the planned budget. IHS has since declined to adjust the BBAHC funding level, claiming (incorrectly) that the agreement was for BBAHC to operate the hospital at IHS' F.Y. 1980 "operating budget" plus seven percent, without regard to the fact that IHS exceeded its operating budget by $100,000.

IHS has further aggravated the funding shortage at the Bristol Bay Area Hospital by incorrectly computing the amount to be withheld from the BBAHC contract for salaries paid to federal employees assigned to work in the hospital under BBAHC direction. As explained in my June 11, 1982 letter submitted herewith, IHS has deducted from the funds available to BBAHC the entire amount of the F.Y. 1981 pay raise, although more than one-half of that raise was funded by Congress. In other words, while no portion of the F.Y. 1981 pay cost supplemental was added to the Bristol Bay Service Unit funding level, IHS is requiring the service unit to absorb the entire cost of the F.Y. 1981 pay raise in F.Y. 1982.

Finally, IHS is also deducting from BBAHC's contract the entire amount of the F.Y. 1982 pay raise for which Congressional appropriations have not yet been made.

Altogether, IHS' actions in computing the amount available for BBAHC operations at the hospital have resulted in grossly unfair under-funding leading to cutbacks and lay-offs which have significantly reduced the level of services below that which existed prior to the BBAHC contract. The drastic financial impact of these errors are indicated in the December 3, 1981 Table submitted herewith and to which IHS has never provided any response.

What this all means is that Indian tribal organizations cannot rely in their dealings with the United States under Public Law 93-638 on full and accurate disclosure of critical financial information. Bluntly, the Government has short-changed this tribal organization by misrepresenting the manner in which the contract amount was determined. It may be, indeed, that BBAHC has legal redress in the courts to compel compliance with the provisions of section 106(h) of Public Law 93-638, but self-determination in Indian health programs cannot possibly succeed if it depends on costly litigation by non-profit Indian tribal organizations to achieve compliance by the Indian Health Service with the provisions of the Act and IHS' contractual commitments.

Our client, the Mississippi Band of Choctaw Indians, submitted an application to contract the operation of the Choctaw Indian Hospital on January 26, 1981. Negotiation of that contract proposal has never been completed because the Indian Health Service has never been able to identify the amount of funds available for operation of the hospital program in F.Y. 1982.

IHS and our client agreed on January 7, 1982, to the postponement of negotiations until final funding information for F.Y. 1982 could be made available by the Indian Health Service. It is my understanding that IHS is still unable to identify the funding level on the basis of which negotiations can be completed. I do not consider it prudent for an Indian tribe or tribal organization with limited financial resources to agree to operate a federal health facility without a definite commitment from the United States as to the amount of dollars available to finance the operation.

Similar difficulties relating to funding levels have affected the health programs of the Metlakatla Indian Community, the Miccosukee Tribe of Indians of Florida and the Norton Sound Health Corporation. While Congress appropriated an F.Y. 1982 funding level including an inflationary cost increase in December 1981, the Indian Health Service issued a directive requiring expenditures at approximately five percent less than in F.Y. 1981. IHS promised to provide tribal contractors with a written explanation of the Congressional constraints which mandate this reduction. However, none has been provided. Instead, IHS has explained to me on the telephone that the Congressional requirements for staffing new facilities and financing the Equity Health Care fund leave five percent less money available for on-going hospital and clinic programs in F.Y. 1982 than Congress provided in F.Y. 1981. I regret that I have not received written confirmation from IHS so that I could furnish complete documentation of the reasons given for reducing IHS funding levels in F.Y. 1982, even though Congress has, apparently, provided appropriations to cover inflationary cost increases. It is, of course, impossible for me to confirm to my clients the accuracy of the IHS' oral explanation of the need for the reductions.

The cutbacks unilaterally imposed by IHS on the Miccosukee Tribe's health programs have led to an urgent need for personnel reductions in order to assure that the program can continue to operate through the end of the fiscal year. However, IHS has recently asked the Tribe not to lay off personnel in order to allow time for IHS to develop more definite information on the contract funding level for the period July 1, 1982 through September 30, 1982.

The implementation of the Congressional mandate that a 638 contractor has available at least the funding level IHS would have had to operate contracted programs has correctly been interpreted by both IHS and the Bureau of Indian Affairs to require the payment of the contractor's administrative costs, as well as costs for activities funded by IHS at a level above that under contract, over and above the contract program funds. While this IHS policy has been repeatedly enunciated by IHS officials, contractors continue to encounter delays in obtaining payment of such costs. For example, the Mississippi Band of Choctaw Indians is currently experiencing a deficit of $188,872 in its F.Y. 1982 indirect cost budget. Unless IHS makes good on its repeated commitments to add these funds to the Choctaw contract, the Mississippi Choctaws will be forced drastically to reduce service levels to cover these costs.

Another funding problem presented for many IHS contractors under P.L. 93-638 is the failure of the Indian Health Service to request funds to provide inflationary cost increases for 638 contractor employees. While IHS has agreed to distribute supplemental pay cost appropriations in F.Y. 1982 to contractors based on their own employees, it has requested such funds from the Congress based only on federal employees. In doing so, it differs from the Bureau of Indian Affairs which has routinely requested and received pay cost appropriations based on 638 contractor employees, as well as federal employees.

The problems noted above have arisen notwithstanding the mandate of section 106 (h) and specific provisions of IHS regulations and guidelines which require IHS to negotiate a contract funding level which is subject to subsequent modification only when the contractor consents or when for reasons beyond the control of IHS the availability of funding is curtailed (for example, when Congress rescinds an appropriation or requires IHS to take actions which limit the amount of an appropriation which is available for the program under contract). See 41 C.F.R. §3-4.6013(13) which bars contract changes without the consent of the contractor.

Specifically, IHS' existing guidelines (ISDM 81-5) allow a reduction below the negotiated IHS contract funding level only when

> Congress or some other source beyond the control of the Indian Health Service will make it necessary to adjust IHS program operating funds ...

Under these guidelines tribal contractors affected by such an adjustment

> decreasing the base funding level will be promptly advised by the Area Program Director of the need for such adjustment and will be given an opportunity to discuss the proposed reduction before the reduction is made.

The reduction of five to ten percent below F.Y. 1981 levels in "hospitals and clinics" funding imposed by the Indian Health Service in F.Y. 1982 failed to conform to these requirements. So far as I am aware the need has never been intelligibly explained to 638 contractors. In the case of the Anchorage Area a reduction of ten percent below F.Y. 1981 levels was imposed unilaterally and without discussion.

In response to an inquiry at IHS Central Office as to why Anchorage was reducing programs below the level directed by Central Office, I was told that Anchorage asserted that the Alaska Natives had agreed to the reduction. I do not know whether Anchorage really said that (the Area Director subsequently denied having said it), but I know that the reduction was imposed by IHS unilaterally on the Bristol Bay Area Health Corporation, the Norton Sound Health Corporation, and the Metlakatla Indian Community.

While regulations and IHS policy guidelines at present support 638 contractors in their attempt to negotiate a firm federal commitment on contract funding, the IHS director is proposing to issue new guidelines expressly authorizing unilateral decreases in contract funding levels. This directive, if issued, will violate IHS regulations under Public Law 93-638 which require the contractor's consent to changes (41 C.F.R. §3-4.6013(13)). If IHS insists on the inclusion of contract language allowing such unilateral budget reductions, it would violate HHS regulations which specify the contract language on which IHS may insist in a 638 contract. See 41 C.F.R. §§3-4.6001 and 3-4.6012. I am submitting herewith a copy of my letter, dated May 21, 1982, which further explains the drastic impact which these proposed 638 contract guidelines would have in undermining the Congressional effort to assure Indian self-determination in federal health services for Indian people.

Mr. Chairman, the implementation of Public Law 93-638 is currently at a critical turning point. Unless the Congress and the Indian Health Service unmistakably reaffirm the federal commitment to permit Indian tribes to operate federal health programs for their members by assuring that such operation can be programmatically and financially viable, the self-determination initiative begun in 1975 will, and should, grind to a halt.

It is unconscionable for the United States to hold out the prospect of self-determination in Indian health to Indian people as a cover for reducing the level of federal financial support so that Indian tribal organizations take the blame for deteriorating levels of service -- blame which should properly fall either upon IHS, itself, or upon the Congress.

Yet that is exactly what has happened in the case of the Bristol Bay Area Hospital. The Bristol Bay Area Health Corporation, a tribal non-profit organization representing the Alaska Native villages of the Bristol Bay region, has been blamed by its service population for lay-offs and other service reductions resulting from IHS' failure to provide the contract funding to which BBAHC is clearly entitled.

Other Indian tribes, such as the Mississippi Band of Choctaw Indians, have observed IHS' performance and have drawn the obvious conclusion --- unless you can absorb the budget cuts resulting from self-determination, don't contract. There are very few Indian tribes with pockets deep enough to afford self-determination in Indian health on these terms.

I appreciate the opportunity of submitting these comments. If you or the Committee staff have any questions on these matters or wish documentation to substantiate the statements which I have made, I will be glad to respond.

Attachments

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 1000
600 NEW HAMPSHIRE AVENUE, N. W.
WASHINGTON, D. C. 20037
(202) 342-3500
CABLE "STERIC WASHINGTON"
TELEX 892406

FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
[illegible]

WRITER'S DIRECT NUMBER IS
202-342-3589
OUR REFERENCE

May 21, 1982

Dr. Everett R. Rhoades
Director
Division of Indian Health
Public Health Service
Room 5A55, Park Lawn Building
5600 Fishers Lane
Rockville, Maryland 20857

Re: Proposed Indian Self-Determination Memorandum 82-3

Dear Dr. Rhoades:

I am writing in response to Ms. Exendine's request of May 4, 1982, for comments on proposed Indian Self-Determination Memorandum No. 82-3, which changes the procedures for negotiating 638 contract budgets as now prescribed by Indian Self-Determination Memorandum No. 81-5.

The proposed ISDM 82-3 radically alters the fundamental principles for establishing 638 funding levels and repudiates the Indian Health Service's prior commitment to support and encourage IHS contracting in conformity with the provisions of section 106(h) of Public Law 93-638.

Funding levels for F.Y. 1983 contracts will be negotiated at the F.Y. 1982 level with no provision for adjustment to reflect increased costs although the Administration's budget request to the Congress includes such adjustments. See, for example, F.Y. 1983 Indian Health Service Justification of Appropriation Estimates, 16,41.

The proposed decision comes on top of IHS' failure to pass on to 638 contractors the mandatory cost increases appropriated by the Congress in F.Y. 1982. In fact, IHS has notified 638 contractors that the funding levels in current 638 contracts will be significantly reduced for F.Y. 1982 (for example, a tentative reduction of five percent -- which may finally be larger -- in "hospitals and clinics" funds for F.Y. 1982).

While we understand that IHS explains that these cuts are required by Congressional directives, the fact remains that the United States is requiring 638 contractors to absorb inflationary increases in contracted health programs through accepting deteriorating levels of services. The promulgation of ISDM 82-3 will crystalize this new federal policy.

While paragraph 4F continues a commitment to pass on in F.Y. 1983 increases made by Congress above the F.Y. 1982 level, the Indian Health Service now asserts the unilateral right to make changes in contract funding levels during the year to ensure implementation of IHS funding priorities. This radical departure from the principles laid down in ISDM 81-5, in the provisions of §36.236 of the Indian Health Service 638 regulations and clause (13) of 41 C.F.R. §3-4.6013 is in conflict with the spirit and the letter of Public Law 93-638 and the regulations of the Secretary of Health and Human Services thereunder, and I will advise my clients against signing any contract containing such language.

Furthermore, ISDM 82-3 introduces a requirement that the Limitation-of-Cost clause required by ISDM 81-1 include the phrase "or decreased." A provision allowing the Government to decrease the contract amount unilaterally is in conflict with the mandatory "changes" clause required by the regulations and with the existing IHS policy contained in ISDM 81-5(3F) which allows decreases in the negotiated funding level only when "the Congress or some other source beyond the control of the IHS will make it necessary to adjust IHS program operating funds." I will certainly do my best to ensure that no Indian tribal organizations which I represent sign contracts which allow the Indian Health Service complete discretion to reduce previously negotiated funding levels during the course of the contract year. A contractor entering into such an arrangement would be acting imprudently and risking financial insolvency.

The provisions of proposed ISDM 82-3 relating to the payment of 638 indirect costs and the March 1, 1982 memorandum incorporated by reference also involve a far-reaching repudiation of prior IHS self-determination policy. As I understand the new procedure, IHS will add indirect cost funds based on a negotiated rate to 638 contract funding levels in F.Y. 1982 (and for new contracts subsequently entered into), but in future years the recurring base for such contract programs will be presumed to include direct and indirect costs so that indirect cost rates would be applied merely as a method of classifying costs.

This approach raises the likelihood that future increases in legitimate contract administrative costs can be funded only from reducing the level of health services. We consider that such a development, if it occurs, would violate the provisions of section 106(h) of Public Law 93-638. It also reinforces the conclusion that IHS policy is now principally motivated by an emphasis on limiting the cost of health services contracted under Public Law 93-638, rather than by the considerations emphasized by the Congress in sections 2 and 3 of Public Law 93-638, ("The Congress recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities") and section 2 of Public Law 94-437 ("A major national goal of the United States is to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level and to encourage the maximum participation of Indians in the planning and management of those services.") See 25 U.S.C. §§450a and 1601.

In view of this proposed shift in emphasis in IHS policies it is imperative that Indian tribes and tribal organizations should not be encouraged to assume the responsibility through 638 contracting for maintaining levels of service notwithstanding the deterioration in the level of federal financial support for the programs. We are aware of your deep commitment to the principles of honesty and forthrightness in dealing with Indian peoples and assume that, in case this new policy is, indeed, implemented, you will ensure that IHS does not encourage tribal organizations to contract for the operation of health services in circumstances which would place the blame on such contractors for reducing the quality of health services or threaten their financial solvency.

If you or your staff have any questions as to these comments or the accuracy of the factual statements contained herein, I will be glad to meet with you to provide any necessary clarification.

Sincerely,

Bobo Dean
/S. Bobo Dean

Copies - see Page Four

Copies: Mr. Buffalo Tiger
Mr. Phillip Martin
The Honorable Harry D. Early
Mr. Robert Clark
Mr. Richard Tubbs
Mr. Clinton Gray
Mr. Steven Unger
Mr. William Dann

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
SUITE 1000
600 NEW HAMPSHIRE AVENUE, N. W.
WASHINGTON, D. C. 20037
(202) 342-3500
CABLE "STERIC WASHINGTON"
TELEX 892406

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

WRITER'S DIRECT NUMBER IS
202-342-3589
OUR REFERENCE
8188-001

June 11, 1982

Mr. Gerald Ivey
Area Director
Alaska Area Native Health Service
P.O. Box 7-741
Anchorage, Alaska 99510

Re: Bristol Bay Area Health Corporation

Dear Mr. Ivey:

Thank you for your letter of May 3, 1982. I do not believe it answers the question asked in my letter of April 21, 1982, and earlier correspondence (including, in particular, my letter of September 16, 1981, to Jim Danielson).

Basically my question is whether it was correct to deduct $1,228,962 from the amount available in "hospitals and clinics" for the F.Y. 1982 contract in order to cover federal payments to IPA and commissioned corps employees. You state that "the F.Y. 1982 funds available to BBAHC will be based on the recurring F.Y. 1981 funds made available through the contract instrument."

However, according to the last information provided to me the F.Y. 1981 contract included $603,662 in "hospitals and clinics" funds, while the F.Y. 1982 contract (subject to some downward adjustment not yet finalized) is supposed to include only $386,775 in "hospitals and clinics" funds because, as explained by Mr. Armbrust of your office to my client last August, the amount deducted from the service unit funding level for IPA and detail personnel increased from $1,061,654 (which was deducted for F.Y. 1981) to $1,228,962 (which was deducted for F.Y. 1982). See Table, dated December 3, 1981 previously submitted by Bristol Bay Area Health Corporation.

The increase in the total "hospitals and clinics" funding for the service unit from F.Y. 1981 to F.Y. 1982 was only $67,437. I assume that this means that the level of funding was not adjusted to reflect the Congressional appropriation of one-half of the October 1, 1980 pay raise.

Thus, in arriving at the so-called "recurring F.Y. 1981 funds made available through the contract instrument," you have deducted the entire amount of the F.Y. 1981 pay raise (although one-half of the raise was funded by the Congress). The funds provided by Congress to pay one-half of the raise were, of course, included in the F.Y. 1981 base figure to which F.Y. 1982 funding level adjustments (minus five percent) are now applicable. However, no portion of those funds were included in the BBAHC funding level for F.Y. 1981 (which was the Bureau's "F.Y. 1980 budget plus seven percent," see Armbrust teletype to Tubbs, dated September 1, 1981).

Together with the further requirement that BBAHC absorb the entire amount of the F.Y. 1982 raise not yet funded by Congress, IHS withholding of the F.Y. 1981 supplemental funds from the BBAHC service unit means a total cut in the "recurring F.Y. 1981 funds" of $216,887 in hospitals and clinics alone.

As fully documented by the December 3, 1981 table prepared by BBAHC staff and provided to your office on several previous occasions, a similar effect takes place in the other funding categories (sanitation, dental, etc.).

I have tried, with the able assistance of the BBAHC staff, to convey a fairly straightforward point both to you and to IHS, Rockville, for the past nine months without noticeable effect. I have spoken to Dr. Stolpe about the December 3, 1981 table on one occasion and he told me it was too complicated for him to understand. I have far too much respect for his and your intelligence, as well as for Jim Danielson's, to believe that the issues raised last September have not long since been made crystal clear.

The question asked last September remains unanswered. If you or your staff feel that I am missing some critical aspect of the matter, I would be most grateful if you would call me about it. In the absence of further clarification, I will have to confirm to BBAHC that the December 3, 1981 table does, indeed, reflect a failure on the part of the Indian Health Service to comply with the provisions of section 106 (h) of P.L. 93-638 requiring 638 contracts to be funded at the level which would have been available to the Secretary to operate the program.

At this time I also wish to repeat the BBAHC position as to the failure of IHS to calculate the amount of the F.Y. 1981 contract in accordance with its representations to BBAHC. Mr. Armbrust stated in his September 1, 1981 teletype that in the F.Y. 1981 contract negotiations it was agreed that the BBAHC contract would be based on the F.Y. 1980 budget plus seven percent, not the actual IHS funding level for the program plus seven percent. He admits that expenses for the program in F.Y. 1981 were at least $69,760 over budget and disputes the BBAHC claim that the excess was in fact greater on the ground that certain expenses were of a non-recurring nature.

When we attempted to resolve this matter with you at the Rockville meeting you declined to provide any additional funding to adjust the BBAHC contract to compensate for the under-funding in the initial year.

The written agreement was (see Article XIX of the contract):

> Funds tentatively allocated to the contract as set forth on pages 4 of 109 and 5 of 109 are based on the President's proposed budget for F.Y. 1981, which reflects a seven (7%) percent increase over F.Y. 1980.

Based on my participation in the negotiations and discussions with the Contracting Officer, Mr. Peterson, with you and other members of your staff and with the former IHS Director, Dr. Johnson, and members of his staff, I am absolutely convinced that all the IHS representatives who were involved, including yourself, believed that the agreement was to provide the actual F.Y. 1980 cost to IHS to operate the program, plus seven percent, rather than an obsolete F.Y. 1980 planning figure plus seven percent. I am confident that there was no intention on the part of IHS to deceive BBAHC into believing that its contract provided a funding level increased by seven percent over F.Y. 1980, when that was really not the case.

Nonetheless, the effect of Mr. Armbrust's teletype of September 1, 1982, and of your decision not to consider any adjustment in funding is just as though there had been such a deliberate intent to deceive.

In contracting under Public Law 93-638 Indian tribal organizations are dependent upon the accurateness and completeness of the financial information provided by the Government. You have the figures. We do not. Public Law 93-638 can only be successfully implemented if tribes can depend on such full, fair and accurate disclosure.

Unless these two matters (the F.Y. 1981 pay raise issue and the initial funding level issue) can be resolved without further administrative proceedings or litigation, I will be compelled to reach the conclusion that Indian tribes should be advised to discontinue health contracting under Public Law 93-638 until the Government is prepared to negotiate with tribes on the basis of reasonably complete and accurate budget data.

I would be grateful for an answer to my letter of May 7, 1982.

Sincerely,

S. Bobo Dean

cc: Mr. Robert Clark
Mr. Richard Tubbs
Mr. James Danielson
Dr. Robert Birch
Robert W. Wagstaff, Esq.
The Hon. Ted. Stevens
(Attention: Ms. Mary Ann Simpson)

SEPTEMBER 1, 1981

TO: R. TUBBS, CONTROLLER, BBAHC

FROM: J. ARMBRUST, CHIEF, A-CHCS

RE: YOUR LETTER OF 08-26-81.

YOU ARE CORRECT BRISTOL BAY'S CONTRACT WAS NOT FUNDED AT THE LEVEL OR ON THE BASIS OF WHAT IT COST IHS TO PROVIDE SERVICES AT BRISTOL BAY IN FY80. THE ACTUAL OBLIGATIONS AGAINST THE BUDGET OF $2,037,300 (ISNE .14 IS NOT COUNTED) WERE $2,107,060 OR $69,760 OVER BUDGET. EQUIPMENT EXPENSES ARE NOT INCLUDED AS THEY ARE NOT BUDGETED FOR AND ARE FUNDED ON A ONE-TIME BASIS AS NO RECURRING FUNDS ARE RECEIVED FOR EQUIPMENT; THIS ACCOUNTS FOR $18,695 OF THE DIFFERENCE IN OUR FIGURES. ALSO, SERVICE UNITS WERE NOT BUDGETED FOR VIP PAY WHICH IS ANOTHER $12,000.

AS WAS STATED DURING NEGOTIATIONS YOUR FY81 CONTRACT VALUE WAS BASED ON THE 1980 BUDGET PLUS 7 PERCENT. FOR ALL SERVICE UNITS, WHILE ACTUAL EXPENDITURES FOR PREVIOUS FISCAL YEAR ARE TAKEN INTO CONSIDERATION IN DETERMINING CURRENT YEAR FINAL BUDGET, BUDGETS ARE NOT BASED ON ACTUAL EXPENDITURES. AS WAS FURTHER POINTED OUT, WE IN FACT DID COMPUTE A BUDGET FOR BRISTOL BAY AS IF IT WERE STILL A DIRECT SERVICE UNIT SEVERAL WEEKS BEFORE NEGOTIATIONS BEGAN. THE FY 81 BUDGET FOR .11 AND .98 WOULD HAVE BEEN $1,933,719 SOME $10,000 LESS THAN WHAT WAS CONTRACTED FOR (SEE MOD #1, PAGE 2).

WE FEEL OUR RECORDS WILL CLEARLY SHOW THAT YOU HAVE ACTUALLY HAD MORE TO OPERATE WITH THAN IF IHS MANAGED THE SERVICE UNIT DIRECTLY. ADVISE IF HAVE FURTHER QUESTIONS/CONCERNS.

◆

AAVHS DLHM
))))

BEST COPY AVAILABLE

BEST COPY AVAILABLE

BRISTOL BAY AREA HEALTH CORPORATION
12/3/81

APPROPRIATIONS LINE ITEMS		BUDGET PER ANNUM	IPA & DETAIL PERSONNEL	DIRECT PERSONNEL	TOTAL LEFT FOR DIRECT PROGRAM	AMT TO MAKE UP IN PROGRAM TO MAINTAIN 81 LEVEL
HOSPITAL & CLINICS	FY-81	1,943,431.00	(1,061,654.00)	(278,115.00)	603,662.00	

NOTE: In fiscal year 81, IHS Hospital & Clinics had a payroll of 40 employees totaling $1,061,654.00. BBAHC had a direct hire payroll in Hospital & Clinics of 8 employees totaling $278,115.00.

(footnote: 48 employees in Hospital & Clinics totaling $1,399,769.06. This would leave $603,662.00 available for Direct Programs)

HOSPITAL & CLINICS	FY-82	2,010,868.00	(1,228,962.00)	(395,131.00)	386,775.00	

NOTE: In fiscal year 82, IHS Hospital & Clinics had a payroll of 35 employees totaling $1,228,962.00. BBAHC had a direct hire payroll in Hospital and Clinics of 13 employees totaling $395,131.00.

(footnote: 48 employees in Hospital and Clinics totaling $1,624,093.00. This would leave $386,775.00 available for Direct Programs.)

SUMMARY: Hospital and Clinics received a modest increase of $67,437.00 in their budget. Personnel costs increased in Hospital and Clinics by $2[illegible]4,324.00 and was not funded! The net result was that we had to absorb $21[illegible],887.00 in Direct Program dollars for the pay increase.
($2,010,868.00 - $1,943,131.00 = $67,437.00 - $284,324.00 = (216,887.00))

						(216,887.00)
SANITATION (IHB)	FY-81	55,101.00	(40,901.00)	-0-[1]	14,200.00	

NOTE: In fiscal year 81, IHS Sanitation had a payroll of 2 employees totaling $40,901.00. No Direct Hires.

(footnote: This left $14,200.00 for Direct Programs)

SANITATION (per teletype of 9/2/81) FY-82 55,233.00 (54,433.00) -0- 800.00

NOTE: In fiscal year 82, IHS Sanitation had a payroll of 2 employees totaling $54,433.00. No Direct Hires.

(Footnote: This left $800.00 for Direct Programs)

SUMMARY: Sanitation received a modest program increase of $132.00 in their budget. Personnel costs increased in Sanitation by $13,532.00 and was not funded! The net result was that we had to absorb $13,400.00 in Direct Program dollars for the pay increases.
($55,233.00 - $55,101.00 = $132.00 - $13,532.00 = ($13,400.00)) ($13,400.00)

DENTAL FY-81 103,000.00 (51,889.00) (31,644.00) 19,477.00

NOTE: In fiscal year 81, IHS Dental had a payroll of 2 employees totaling $51,889.00. HBAIC had a Direct Hire payroll in Dental of 2 employees totaling $31,664.00.

(Footnote: 4 employees in Dental totaling $83,553.00. This would leave $19,447.00 available for Direct Program.)

DENTAL FY-82 105,544.00 (73,251.00) (36,052.00) (3,759.00)

NOTE: In fiscal year 82, IHS Dental had a payroll of 2 employees totaling $73,251.00. HBAIC had a Direct Hire payroll in Dental of 2 employees totaling $36,052.00.

(Footnote: 4 employees in Dental totaling $109,303.00. This would leave us a program deficit of ($3,759.00) available for Direct Program)

SUMMARY: Dental received an increase of $2,544.00 in their budget. Personnel costs increased in Dental by $25,750.00 and was not funded! The net result was that we had to absorb $23,206.00 in Direct Program dollars to pay for increases to maintain FY-81 level. However, as you can see, in this program, we did not have enough Direct Program dollars left to absorb the pay increase. We felt that we could not cut back on positions in an already "maintenance program", we have proposed, and received oral approval to combine our regular Dental budget and our Contract Health Care Dental budget to continue the Dental program.

(105,544.00 - 103,000.00 = 2,541.00 - 25,750.00 = (23,206.00)) (23,206.00)

BEST COPY AVAILABLE

CONTRACT HEALTH CARE DENTAL FY-81 $39,600.00 -0- -0- $39,600.00

NOTE: Monies to provide dental services to five (5) villages in the Bristol Bay Service Unit.

CONTRACT HEALTH CARE DENTAL FY-82 $42,388.00 -0- -0- $42,388.00

NOTE: Monies to provide dental services to five (5) villages in the Bristol Bay Service Unit.

SUMMARY: CHC Dental received a program increase of $2,788.00 in their budget. As noted above, we have received oral approval to use some of these monies to offset the deficit in regular Dental. However, our existing staff will have to attempt to pick up the 5 contracted villages. This will mean less time available to the vilaiges which were previously served by BBAHC. (this includes Dillingham)

($42,388.00 - $39,600.00 = $2,788.00) $2,788.00

MAINTENANCE & REPAIR FY-81 $36,400.00 -0- -0- $36,400.00

NOTE: Monies to provide supplies and etc., for Maintenance & Repair of the Hospital and adjacent facilities at Kanakanak.

.AINTENANCE & Repair FY-82 $36,400.00 -0- -0- $36,400.00

NOTE: Monies to provide supplies and etc., for Maintenance & Repair of the facilities located at Kanakanak.

SUMMARY: We did not receive an increase or decrease in total program dollars. However, with inflation continually eating away at available program dollars, and without any increases, we cannot purchase the same volume or quality of materials.

BEST COPY AVAILABLE

MENTAL HEALTH (travel only)	FY-81	$2,100.00	-0-	-0-	$2,100.00

NOTE: Monies for emergency patient and Social Worker travel in the Bristol Bay Service Unit.

MENTAL HEALTH (travel only)	FY-82	$1,677.00	-0-	-0-	$1,677.00

NOTE: Monies for emergency patient and Social Worker travel in the Bristol Bay Service Unit.

SUMMARY: Mental Health (travel only) received a program cut of ($423.00) over our Fiscal Year 81 budget. This was tied to the cuts proposed by the House and Senate.

($1,677.00 - $2,100.00 = (432.00)) ($432.00)

* * * * * * *

SUMMATION

As can be seen by the above breakout, the IHS payroll gets larger and the number of employees on their payroll decreases. This can be contributed largely to the last two (2) Federal Pay Acts which have been passed, but funds have not been appropriated to cover the pay increases. Programs have been instructed to absorb all or part of these pay increases in the direct programs. The FY-81 pay increase (October 80) was to be 50% funded and the remaining 50% absorbed in program. BBAHC had to absorb 100% of this pay act. The FY-82 pay increase (October 81) was to be absorbed 100% in Direct Program, The total authorized employment ceiling for BBAH is 54 positions, the pay increases for these employees total $323,606.00, this $323,606.00 had to be absorbed in total (100%) by program. The modest increase which we received in our programs (Hospital & Clinics, Sanitation, Dental, CHC Dental, Maintenance & Repair, and Mental Health-travel) total $72,478.00.

The remainder, ($251,128.00) is the deficit which we must make up in hospital programs to maintain the FY-81 level of funding available to carry out Direct Program.

($72,478.00 - $323,606.00 = (251,128.00)) ($251,128.00)

BEST COPY AVAILABLE

SUMMATION (cont.)

Please note, that the deficit of ($251,128.00) does not reflect any inflation factor. The rising cost of supplies, travel, services and etc., must be added on top of this amount, to correctly reflect our true deficit or monies which we must make up in our budget to maintain the FY-81 direct program service available to residents of Bristol Bay.

($251,128.00) + the inflation factor of 10 to 15% ($60,366.00 to $90,549.00) = ($311,494.00 to $341,677.00)

The impact that inflation is having on the rest of IHS services or facilities who are our referral centers is also creating additional financial problems. Alaska Native Medical Center in the past has paid for the return transportation of all patients referred to them by our BBAHC Physicians. This will no longer be done. The individual, family members, friends, other 3rd-party sources, or BBAHC must now pay for this. Also, ANMC has in the past provided BBAHC with up to 22 specialty clinics, this cost of transportation and per diem for the specialist was borne by Alaska Area Native Health Services. However, now the receiving facility must pay for these clinics. Many more cost containment measures such as this will undoubtedly be instituted by ANMC and other referral centers, the net result being that the individual, family members, friends, other 3rd-party sources, or BBAHC will have to absorb the costs. Until an appropriations bill is passed by the House & Senate, then signed by the President, we will not know what the final funding level will be. The latest information which we have available to us proposes that IHS will take a 12% cut and according to the terms of our contract, this cut will be passed on to BBAHC. The potential for BBAHC to receive more funds than have been made available to us seems very unlikely. We are in the process of developing, with the assistance of Ernst & Whinney, Accounting Firm, a 3rd party billing and collections system. Hopefully, the increased revenues which are generated by this improved system will offset any further congressional cuts.

BEST COPY AVAILABLE

MEMORANDUM NO.

Re: Proposed Changes in BIA Regulations Under Public Law 93-638

The Bureau of Indian Affairs is proposing changes in the regulations under the Indian Self-Determination and Education Assistance Act, Public Law 93-638, which are of crucial importance to Indian tribes interested in operating BIA programs under that Act. The changes are expected to be published in the Federal Register and circulated to tribes by the Bureau in the near future. Comments may be filed with Assistant Secretary Ken Smith, Attention: Dale Heald, for sixty days after publication and final regulations will be issued subsequently to the comment period.

Our Memorandum No. 81-29 discussed an earlier version of the changes. This Memorandum will identify problem areas in the new version, as well as noting those areas in which the Bureau has corrected deficiencies on which we commented in Memorandum No. 81-29. Each tribe should, of course, review the proposed changes carefully as there may be aspects affecting a particular tribe's situation which are not mentioned in the Memorandum.

The Bureau still proposes a shift from "contracts" to "grants" under Public Law 93-638. It argues that this change is required by the Federal Grant and Cooperative Agreement Act, Public Law 95-224, based on an opinion, dated April 28, 1981, of the Solicitor of the Department of the Interior. It further argues that the shift is:

> a technical change in form; substantive rights and obligations under Public Law 93-638 are not being altered by this law.

We have concluded that the Department is in error in concluding that Public Law 95-224 implicitly amended P.L. 93-638 so as to require "grants" instead of "contracts" under section 102 of that Act. In section 102 of Public Law 93-638 the Congress directed the Secretary of the Interior to contract with Indian tribal organizations when certain specific statutory criteria are satisfied. This legislation is unique and quite unlike any other federal law providing for federal financial assistance. It is specific to Indian tribes. There is no evidence in P.L. 95-224 or in its legislative history that Congress considered the special program authorized for Indian tribes by P.L. 93-638 when the later law was enacted.

Generally, implied repeals are not favored. See Morton v. Mancari, 417 U.S. 535 (1978). Furthermore, general legislation is not usually held to apply to Indian tribes or to limit Indian rights in the absence of evidence of Congressional intent than it should. Menominee Tribe v. United States, 391 U.S. 404 (1968). In a leading case on Congressional termination of Indian rights, United States v. Santa Fe Railroad Company, 314 U.S. 339 (1941), the Supreme Court held that Indian rights had not been modified by Congressional legislation when there was no "clear and plain indication" of an intention to extinguish tribal rights, observing "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." 314 U.S. 354. Bryan v. Itasca County, 426 U.S. 373 (1974); Squire v. Capoeman, 351 U.S. 1 (1956).

The curtailment of tribal rights resulting from the Bureau's use of "grants" rather than "contracts" under P.L. 93-638 should not be given effect in the absence of careful consideration by the Committees of the Congress charged with special responsibilities in the field of Indian affairs. Curiously, the Secretary of Health and Human Services is continuing to "contract" under section 103 of P.L. 93-638 which is identical to section 102 except for applying to the Indian Health Service instead of to BIA programs. Thus, even within the Executive Branch, there is a difference of view as to whether Public Law 95-224 requires the use of "grant instruments" under Public Law 93-638.

The Bureau's proposed changes undermine tribal rights under Public Law 93-638 in a number of aspects notwithstanding the assurance that "substantive rights and obligations" are unaltered.

1. Transition. Tribal contractors under P.L. 93-638 now have three-year contracts or a right to recontract under 25 C.F.R. §271.20. The Bureau has no discretionary authority to cut off these programs which are subject only to budget negotiations and the availability of appropriations. Under proposed §271.22 these programs will be subject to "continuation grant" requirements and will be "reviewed in the same manner as initial applications and evaluated according to the same criteria."

In a memorandum, dated June 24, 1982, the Bureau has recognized that the proposed changes cannot be in place in time to affect F.Y. 1983 contract negotiations and directed that such negotiations shall take place under the existing regulations. Existing contractors will, therefore, be entitled to all their existing rights. However, when such contracts become subject to renewal, the provision of §271.22 for review and evaluation under the new regulations would allow a declination in circumstances in which it would not now be permitted. See 25 C.F.R. §271.20., which eliminates the Bureau's discretion to decline a recontracting application.

2. Increased Role for Area Director and Superintendent. Under the present system, BIA Area Directors can only recommend the declination of 638 applications, and contracts are generally awarded by Area Contracting Officers. Under the new system, Area Directors may decline applications (subject to appeal to the Central Office) and Superintendents will award grants. Tribes may question the desirability of vesting increased authority in the Area Director and whether Agency Superintendents and their staffs have the resources and expertise to administer the paperwork essential in a grant program.

3. "Special Grant Conditions" and "Cooperative Agreements." While the mandatory terms of 638 contracts are currently specified by regulation (41 C.F.R. Part 14H-70), the proposed §271.21 gives the Bureau the authority to impose special more stringent grant

conditions when a grantee has "violated grant performance requirements" or has a management system which does not meet regulatory requirements. While the imposition of such requirements is now made subject to tribal appeal, the "special conditions" are apparently to be tailor-made by the Superintendent or Area Director.

In addition, under proposed §271.23, a cooperative agreement, instead of a grant, may be required by Bureau officials if "performance would be improved by the use of a cooperative agreement," substantial Bureau involvement is required to protect trust resources, technical assistance can best be provided through continued substantial involvement of Bureau personnel or tribal management systems are inadequate.

While the regulations do apparently provide for an appeal of "any decision affecting an application or grant," it is not clear whether the declination criteria and the "burden of proof on the Bureau" provisions which are retained from the existing regulations in proposed §271.20 would apply in the case of the imposition by the Bureau of "special conditions" or a requirement for a "cooperative agreement."

The present 638 system pre-supposes that Bureau officials may oppose tribal self-determination initiatives and seek to limit their discretion while allowing a declination when the Bureau can produce "substantial evidence" to justify turning down a contract under the statutory declination criteria. If a contract is awarded, the present regulations prescribe the clauses on which Bureau officials may insist. Proposed §§271.21 and 271.23 substantially increase the authority of Bureau officials to develop grant conditions without regard to tribal wishes and (possibly) free of the need to justify Bureau decisions on appeal under the declination standards. *If allowed to stand, this proposal may be the most significantly detrimental aspect of the proposed changes.*

4. *Grant Requirements: Revised Part 276 and OMB Circulars A-102 and A-87.* The Bureau proposes to replace the standard 638 contract requirements contained in 41 C.F.R. Part 14H-70 by the requirements of OMB Circulars A-102 and A-87. The proposed changes in 25 C.F.R. Part 276 provide for this change, which is justified "to provide uniformity with other federal agencies to the maximum extent practical and to simplify the regulatory process."

This change would mean that future revisions in these OMB Circulars would become applicable to 638 grants without compliance with the requirements mandated by section 107 of Public Law 93-638 for changes in regulations under the Act. In view of detailed requirements contained in Circular A-102, the elimination of the review process mandated by the Act is sufficient grounds, in itself, to object to the substitution of the Circular for Part 14H-70.

The proposed changes in Part 276 also include the requirements for liability and other forms of insurance now required by 41 C.F.R. 14H-70. We understand that OMB is objecting to these insurance requirements and is holding up publication of the proposed changes for this reason. In our view, deletion of the requirements for reasonable insurance requirements for 638 contractors (or "grantees") would exhibit gross federal irresponsibility.

The proposed changes in Part 276 as to use of program income requires interest on advances of federal funds to be remitted promptly to the Bureau "unless the recipient of the advance is a tribal governing body or a tribal organization controlled, sanctioned, or chartered by the governing body," but also applies OMB Circular, Attachment M, which allows interest earned on federal advances made to "tribal organizations pursuant to section 102" of Public Law 93-638 to be retained by the contractor. The gist of all this is that the interest can be retained by 638 contractors as under the present regulations, but the change is confusing.

A more serious effect of this proposed change is the elimination of the use of GSA motor vehicles and supply sources (§§14H-70.501 and 502). Many Bureau contract schools provide transportation for students utilizing GSA school buses. Under the Bureau's proposed change, buses would have to be purchased or leased. Contract schools are funded under the Indian School Equalization Program required by Public Law 95-561 and must pay the cost of student transportation from funds allocated under the ISEP formula. The withdrawal of GSA buses would make school transportation financially impossible for such contract schools. It would also violate the intent of section 106(h) of P.L. 93-638 and the ISEP regulations by imposing on contract school operations a program cost not imposed with respect to schools operated directly by the Bureau of Indian Affairs. The elimination of GSA supply sources would significantly increase the costs of operating 638 programs for many tribal organizations. We question whether these two changes can be made without violating section 106(h) of the Act and, in the case of contract schools, Public Law 95-561 which requires the equitable distribution of financial support among BIA-operated and BIA contract schools.

Tribal staff should review the detailed standards for grant records (Attachment C), program income (Attachment E), financial management (Attachment G), financial reporting (Attachment H), monitoring and reporting of program performance (Attachment I), grant payment (Attachment J), budget revision (Attachment K), property management (Attachment N), procurement (Attachment O), and grant closeout (Attachment L), all of which are made applicable to 638 programs by the proposed changes in 25 C.F.R. Part 276 and OMB Circular A-102.

New mandatory travel policies, which must apply to all the official travel of the grantee regardless of source of funds are set forth in proposed §276.17. Indian employment preference requirements now found in Part 14H-70 are continued in proposed §276.20, and the general availability of information and reports to the Indian people being served is required by proposed §276.23.

5. Contract Administration Costs. The Bureau's existing regulations expressly provide that the 638 contractor's minimum

funding level includes the Bureau's costs of planning, administering, and evaluating the contract program "*and will not be used to reduce indirect costs otherwise allowable to the tribal organizations.*" See 25 C.F.R. §271.54(a). The Bureau now proposes to eliminate the unscored language. Apparently, the Bureau's intention is to depart from the commitment to provide such additional funding (as "indirect costs") as is necessaray to pay the contractor's costs for those activities which it must engage in as a contractor and which the Bureau does not perform in its own program operations (legal, accounting, insurance, etc.). The effect of this change is dependent on the Bureau's new approach to the Indian Contract Support Fund which has not yet been announced.

5. *Improvements in Proposed Changes*. In a number of respects the Bureau has corrected deficiencies which were pointed out in the earlier versions of the changes. See our Memorandum No. 81-29. Most of these relate to the procedures for negotiating or terminating 638 grants.

Any Bureau decision refusing to approve a grant application will be subject to appeal as provided in §271.60(a). Such a decision based on lack of funding will now be treated as a declination matter and processed in the same manner as other declinations in proposal §271.20. On appeal, the Area Director has the burden of demonstrating through substantial evidence that a ground for declination exists. The Bureau's decision to insist on special conditions or a cooperative agreement would also, apparently, be subject to appeal under proposed §271.60(a).

However, it is not clear that the Bureau would carry the burden of proof in such appeals and appropriate language should be added in §§271.21 and 271.23 to make clear that it would.

The Bureau will have sixty days after receiving an application to approve it or to notify the applicant of a declination. Shorter time frames are specified for interim responses at the Agency or Area levels, and the applicant is entitled to move the application to the next higher level in case a deadline is missed. See proposed §§271.19, 271.21 and 271.25.

Grant revisions and amendments are required to be processed in the same manner as initial applications so that the declination requirements should apply. Apparently, unilateral amendments by the Bureau are not authorized by proposed §271.26, but they are not expressly prohibited as they are by the existing regulations. See §14H-70.620. Since Attachment K of OMB Circular A-102 provides in certain instances for agency approval of budget revisions, §271.26 should contain an explicit cross reference to make clear that 638 declination standards are applicable to such amendments.

Tribal applications will be entitled both to an informal hearing and, if requested, a formal hearing in declination proceedings under proposed §271.60. The proposed changes continue to allow no extension of time to appeal. See §271.60(b)(1). This differs from the existing regulations and is particularly significant in view of the final decision making authority vested by the proposed changes in the Area Director.

The informal hearing would take place prior to the Commissioner's decision on the appeal. Following the Commissioner's decision, a formal hearing may be requested or the applicant may elect to appeal to the Assistant Secretary for Indian Affairs without a formal hearing. The formal hearing would be conducted by the Departmental Office of Hearings and Appeals. The Administrative Law Judge conducting the hearing would make a formal recommendation to the Assistant Secretary. The Assistant Secretary would then render a final decision for the Department and could depart from the Administrative Law Judge recommendation.

The Bureau has restored language giving 638 contractors a right to notice, appeal, and a hearing in case of the cancellation or reassumption of a 638 program by the Bureau. See proposed §271.54. Except in emergency situations, tribal contractors would be given sixty days to correct deficiencies. However, this language needs to be strengthened to insure that the grant closeout provisions in OMB Circular A-102, Attachment L, are not interpreted to allow the Bureau to suspend or terminate grants or withhold payments without complying with the requirements of §271.54. In particular, the provision for "termination for cause" in Attachment L is inconsistent with §271.54, and the regulations must make clear that it is not controlling.

The Bureau changes include a commitment to continue "as nearly as possible" programs which have been reassumed or cancelled for cause (or retroceded by a tribe), but the position bank reserve established in 1975 to insure the availability of authorized personnel in such cases would be abolished by the proposed changes. This change appears to be a breach of faith, especially to those tribes which contracted under the provisions of the existing regulations. See 25 C.F.R. §271.77.

RE[illegible] 1982

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
SUITE 1000
600 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20037
(202) 342-3800
CABLE "STERIC WASHINGTON"
TELEX 892406

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

WRITER'S DIRECT NUMBER IS
202-342-3589

OUR REFERENCE
9192-001

July 13, 1982

The Honorable William S. Cohen
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: Norton Sound Health Corporation

Dear Senator Cohen:

I have been requested by our client, the Norton Sound Health Corporation, to submit a statement for inclusion in the record of the oversight hearing on Public Law 93-638 held on June 30, 1982, by the Senate Select Committee on Indian Affairs relating to the failure of the Bureau of Indian Affairs to comply with the existing regulations under P.L. 93-638.

As the enclosed documentation indicates, our client applied for a small social services contract under the procedures prescribed by the regulations. On July 18, 1980, the Bureau advised that it "found no technical problems with the program aspects of the proposal which could possibly raise a declination issue." and officially confirmed the availability of $26,000 for the contract. A question of our client's eligibility as a 638 contractor was raised, however, and was resolved by a memorandum from the Office of the Regional Solicitor, U.S. Department of the Interior on October 2, 1980, which confirmed its eligibility.

On December 1, 1980, our client was formally notified in writing that its application "has been reviewed and approved in accordance with 25 C.F.R. 271" and on January 12, 1981 the Bureau notified our client that the "contract will be awarded within the next 30-45 days."

However, on January 21, 1981, the Bureau notified our client that the contract "is inappropriate for funding under current policy." Later by telephone Norton Sound Health Corporation was told that social services for persons with mental problems was "outside the scope of the BIA. Rather, those services proposed in the contract were authorized only to the IHS by Congress."

We called the Bureau's attention to the fact that it had failed in this matter to comply with 25 C.F.R. Part 271 in many respects but were informed that it now considered the application to be one for medical care, since "care and treatment for alcoholism, other forms of drug abuse and mental health services" were involved. Our client initially appealed and a hearing before the Office of Hearings and Appeals of the Department of the Interior was initially scheduled for September 16, 1981.

In order to avoid the expense to our client of a formal hearing we then attempted to negotiate a settlement of the matter by revising the proposal to eliminate any provision for medical treatment. While we devoted considerable time to the development of a revised proposal providing explicitly for social service counseling and referrals, and no treatment to be financed by the Bureau, the Bureau ultimately refused to settle the matter. See enclosed letter dated February 22, 1982. Meanwhile, the Office of Hearings and Appeals declined to authorize the payment of the travel expenses of Norton Sound Health Corporation's legal counsel.

Finally, in view of the relatively small amount involved in the application, the expense already incurred and the additional expense which would be involved in a formal hearing, Norton Sound Health Corporation withdrew its request for a hearing.

However, it has authorized us to make this submission to you to illustrate the Bureau's continued failure to conform to its own regulations under Public Law 93-638. In our view the Bureau's eventual position adopted after approval of the application that social services counseling may not be funded by the Bureau under Public Law 93-638 if the counseling can be characterized as treatment of the mentally ill is legally unsound as well as coldly heartless and outrageous. We ask that your Committee look into the extent to which the attempt to meet human needs of Alaska Natives of the Norton Sound region, as well as of Indians and Alaska Natives generally, are adversely affected by the kind of wooden and compartmentalized approach to federal assistance programs demonstrated by this case.

Furthermore, we submit that the Bureau should concentrate its attention on understanding and assuring the rights of Indian tribal organizations under its existing 638 regulations rather than undertaking a wholesale revision which purports to enhance tribal rights but which -- as other testimony before your Subcommittee illustrates -- in fact would significantly curtail existing rights.

Sincerely,

FRIED, FRANK, HARRIS, SHRIVER
& KAMPELMAN

By

Encl.
cc: Mr. Clinton Gray
Ms. Mary Ann Simpson
Ms. Linda Richardson
Ms. Kathy Johnson

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
A PARTNERSHIP WHICH INCLUDES PROFESSIONAL CORPORATIONS
SUITE 1000
600 NEW HAMPSHIRE AVENUE, N. W.
WASHINGTON, D. C. 20037
(202) 342-3500
CABLE "STERIC WASHINGTON"
TELEX 892406

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
ONE NEW YORK PLAZA
NEW YORK, N.Y. 10004

April 30, 1982

WRITER'S DIRECT NUMBER IS
202-342-3589

OUR REFERENCE
9192-001

Bruce M. Landon, Esquire
Attorney-Advisor
U.S. Department of the Interior
Office of the Regional Solicitor
Alaska Region
510 L Street, Suite 100
Anchorage, Alaska 99501

Re: Docket No. D-81-2 -
Appeal of Norton Sound Health Corporation

Dear Mr. Landon:

I have been instructed by our client, the Norton Sound Health Corporation, that it is withdrawing its appeal in the above-entitled matter. By this action our client makes no concessions as to the issues involved in the appeal. It is unable, however, to devote additional resources to the prosecution of this appeal.

Sincerely,

S. Bobo Dean

S. Bobo Dean

cc: The Hon. Abigail Dunning
Mr. Raymond Butler
Mr. Jacob Lestenkof
Mr. Clinton Gray

RECEIVED JAN 18 1982

IN REPLY REFER TO

United States Department of the Interior
ALASKA NATIVE CLAIMS APPEAL BOARD
P.O. BOX 2433
ANCHORAGE, ALASKA 99510

IN RE: Appeal of Norton Sound Health Corporation
Docket No. D 81-62

ORDER

GRANTING CONTINUANCE

It is my understanding that settlement negotiations are progressing and that, with the concurrence of the BIA, the appellant wishes to continue the hearing in this matter until at least thirty days after the BIA responds to a revised contract application prepared by the appellant.

Such a hearing date would be indefinite and could be determined, as the appellant suggests, only by consultation with the parties. Therefore, rather than date the continuance from the Government's response, it appears less cumbersome simply to continue the hearing until the appellant requests that it be reset. It is so Ordered.

The appellant is directed to advise me of the status of the negotiations within sixty (60) days from the date of this Order, if a hearing has not been requested by that time.

DATED this 11th day of January, 1982, at Anchorage, Alaska.

Abigail F. Dunning
ABIGAIL F. DUNNING
Administrative Judge

DISTRIBUTION:

Norton Sound Health Corp.
S. Bobo Dean, Esq.
Fried, Frank, Harris, Shriver & Kampelman
600 New Hampshire Ave., N.W.
Suite 1000
Washington, D.C. 20037

Bureau of Indian Affairs
Office of the Regional Solicitor
Bruce Landon, Esq.
510 L Street, Suite 100
Anchorage, Alaska 99501

courtesy copy:

Raymond V. Butler
Wm. Philip Horton
Robert J. Martin
David Case, Esq.

Theodore C. Krenzke
Acting Commissioner
Bureau of Indian Affairs
1951 Constitution Ave., N.W.
Washington, D.C. 20245

Copied [illegible]

IN REPLY REFER TO:
Support Services

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Juneau Area Office
P. O. Box 3-8000
Juneau, Alaska 99802

RECE[illegible] 1982

February 22, 1982

Mr. William Dann
Executive Director
Norton Sound Health Corporation
P.O. Box 966
Nome, Alaska 99762

Dear Mr. Dann:

The Purpose of this letter is to respond to your proposal for a 638 contract to fund one half-time social worker. This letter responds to your proposal as received as well as clarifications provided by your counsel and attempts we have made with your counsel to modify the proposal in order to obtain a contractible program. Unfortunately, these efforts have been unsuccessful. We must therefore disapprove your proposal and are at a loss to suggest modifications which would make the proposal acceptable.

25 CFR 271.12 Contractible Bureau Programs, provides in part that, "Tribal organizations are entitled to contract with the Bureau to plan, conduct, and administer all or parts of any program which the Bureau is authorized to administer for the benefit of Indians." Therefore, for a proposal to be contractible by the BIA it must be for a program which the BIA rather than some other agency is authorized to administer.

42 U.S.C. §2001 provides:

> All functions, responsibilities, and duties of the Department of the Interior, the Bureau of Indian Affairs, Secretary of the Interior, and the Commissioner of Indian Affairs relating to the maintenance and operation of hospital and health facilities for Indians, and the conservation of the health of Indians, are transferred to, and shall be administered by the Surgeon General of the United States Public Health Service, under the supervision and direction of the Secretary of Health Education and Welfare.

The BIA is no longer authorized to administer programs within the responsibilities of the Indian Health Service. Although your proposal described the program to be contracted by quoting 25 CFR § 20.24(b)(1) (Family Counseling and Community Services), we were, nonetheless, concerned that a health services program was envisioned for a number of reasons. First, the quality control procedures related exclusively to patient charts, psychological and psychiatric reviews, "and success in addressing the needs of clients for counseling and referral as a component of Norton Sound Health Corporation's community mental health program." In addition, the statement of need strongly emphasized alcohol and mental health problems. However, by letter dated December 7, 1981, your counsel, S. Bobo Dean, clarified that the target population of the proposal was all Alaska Natives of Nome and the fifteen villages served by Norton Sound Health Corporation; that all of the Bureau-funded activities would be evaluated under the MBO system previously filed with the Bureau; and finally, the BIA-funded social worker would definitely assist the matters related to general assistance grants. In subsequent communications with your counsel, it became clear that the proposal should be interpreted as a proposal to perform the social services functions currently provided by the Nome Agency. Such a program would be authorized. However, a number of obstacles to approval of the proposal in its "clarified" form remain.

First, we cannot agree that the resolutions submitted with Mr. Dean's letter of December 15, 1981, are sufficient to cover BIA social services. BIA social services do not fall within the normal meaning of "health and related services." In addition, the whereas clauses in the resolution relate exclusively to health matters. We therefore conclude that the villages in making those resolutions did not contemplate the provision of BIA social worker services by Norton Sound Health Corporation. This conclusion is confirmed by the fact that one of the communities (Nome Eskimo Community) as itself contracted to provide BIA social services in the City of Nome. An example of appropriate wording for a social services resolution is as follows:

> TRIBAL REQUEST FOR CONTRACT PURSUANT TO TITLE I,
> INDIAN SELF-DETERMINATION ACT
>
> WHEREAS, the ______________ Council is an Alaska Native village recognized by the United States, and/or
>
> WHEREAS, the ______________ is an Alaska Native village organized as an Indian tribe pursuant to the provisions of the Federal Indian Reorganization Act; and
>
> WHEREAS, as such, the ______________ Council is authorized as an Indian tribe under the provisions of section 102 of the Indian Self-Determination Act, Public Law 93-638, to request a contract with the Secretary of the Interior to plan, conduct, and administer programs or portions of programs which the Secretary of the Interior is authorized to administer for the benefit of Indians pursuant to the Act of November 2, 1921, and any Act subsequent thereto; and
>
> WHEREAS, the Secretary of the Interior is directed by section 102(a) of Public Law 93-638, upon the request of any Indian tribe, to enter into such a contract; and
>
> WHEREAS, the ________________ Council is the governing body of the ___________________ recognized by the United States; and

WHEREAS, the ______________________________ is on organization representing the Alaska Natives of the __________ region of Alaska established by the Alaska Native Claims Settlement Act and which qualifies as a "Indian Tribe" as such term is defined in the Indian Self-Determination and Education Assistance Act by virtue of being identified in section 7 of the Alaska Native Claims Settlement Act: and

NOW, THEREFORE, BE IT RESOLVED, that the ____________________ Council hereby requests the Secretary of the Interior to enter into a contract with ________ pursuant to section 102 of Public Law 93-638 and §271.18 of Part 271 of Title 25, Code of Federal Regulations covering the scope and in accordance with the terms and conditions hereinafter set forth:

FURTHER RESOLVED that the scope of the proposed contract is to contract some of the BIA services and programs now conducted by the __________ Agency Office, Bureau of Indian Affairs which are contractible under the provisions of Public Law 93-638: including housing, education, village government services, employment assistance, credit services, and administrative and plant management support of all such programs, social services, (social casework as described at 25 CFR § 20.24, Family and Community Service):

FURTHER RESOLVED that the Executive Director of _____ be and hereby is authorized and directed to negotiate and execute the contract and any amendments, extensions of renewals or additional contracts for the performance of other Bureau of Indian Affairs programs; the Bureau shall send copies of all contract documents and correspondence to him, and he shall file with the ________________ Council a copy of any proposed contract amendment, renewal or extension prior to the execution thereof, provided that no contract covering services to ___________ Council shall be executed if within thirty days after filing with ______________ Council shall file a written objection thereto with the Commissioner of Indian Affairs and the Executive Director of ___________________________:

FURTHER RESOLVED that the authorities granted by this resolution shall be in effect until this resolution is rescinded;

FURTHER RESOLVED that the Executive Director of _____ shall, prior to executing any such contract, present it to the Board of Directors of _____ for review and approval;

FURTHER RESOLVED that the proposed date for contract commencement shall be October 1, _____, and the contract shall terminate on September 30, ____, subject to the annual renegotiation of the contract budget;

FURTHER RESOLVED that the ____________Council hereby requests that the Bureau of Indian Affairs furnish information and technical assistance pursuant to the provisions of §271.16 and 271.17 to Title 25, code of Federal Regulations, as may be necessary in the preparation of a contract application to BBNA;

FURTHER RESOLVED that the ___________Council hereby authorizes the Executive Director of ________ to act on behalf of the ________________Council in obtaining all necessary information and technical assistance from the Bureau pursuant to §271.16 and 271.17, Title 25, Code of Federal Regulations, negotiating for the renewal of the contract pursuant to §271.20, prosecuting appeals from Bureau decisions under §271.26, 271.82, 271.83 and 271.84, revising or amending a contract under §271.6, and in all other respects to represent the ___________Council in matters involving contracts or contract applications with the Bureau of Indian Affairs under Part 271, Title 25, Code of Federal Regulations.

CERTIFICATION

This will certify that the foregoing resolution was approved at a meeting held this _____ day of __________, 1978, at which a quorum of Council members were in attendance.

____
President, Village of

ATTEST:

____
Secretary

Given the expense involved in obtaining new resolutions we have endeavored to identify any additional obstacles to a contract which might arise should the resolutions be obtained. The most serious problems are funding and diminution of services. At present BIA is contracting social services with five individual villages (including Nome Eskimo Community within the NSHC service area) and Menelek, Inc., which serves six additional villages. The Nome Agency is currently funded for only one GS-7 Social Worker who provides services for Deering and all the villages in the NSHC service area except Nome. In addition, that social worker monitors the other contractors. If BIA were to contract with NSHC, we would have to displace* the BIA social worker. That would leave Deering with absolutely no provision of services either by a contractor or the Nome Agency. In addition, it would leave the Nome Agency with no monitoring ability.

---

* 25 CFR § 271.21(b) requires a 120-day waiting period before the starting date of any contract which would displace a Bureau employee.

The Department has a signed F.Y.'82 Appropriation Bill, (President approved on December 23, 1981), but as of the date of this letter the Juneau Area Office has not received its '82 Advice-of-Allotment for our share, and hence, cannot predict precise funding for Social Services for FY'82. With this uncertainty in mind we have studied the problem and therefore offer our analysis and conclusions of a review of possible funding alternatives pursuant to 25 CFR § 271.22, (c), (1), (i through vii). In view of the foregoing, I find that your proposal would probably have to be rejected because of a lack of funding even if the proper resolutions could be obtained.

§ 271.22, (c), (1), (i through vii)

Funding Alternatives:

(i) The Bureau may make available additional funds resulting from savings in other Bureau programs, subject to established reallocation or reprograming procedures.

In F.Y.'82, the JAO is being forced to conduct operations with less funding than that provided in F.Y.'81, or at the minimum, 4% less than the '82 planning figures, and in the absense of the regular '82 Allotment, possibly an even greater reduction. At the present time we cannot identify any additional funds which we believe will be savings in any of our other Bureau Programs. If anything, our predictions indicate our overall shortfall will adversly affect several of our trust and trust related functions. Given the late receipt of the actual '82 Allotment it is impossible to consider any reallocation or reprograming (savings) possibilities because with almost 1/2 the fiscal year gone we simply do not know if there will be any savings in other Bureau programs. It is not feasible to consider this alternative to fund the proposal.

(ii) The tribe(s) may obtain grant funds under Part 272 of this chapter to cover any initial "start up" costs included in the proposal.

This alternative is not possible because NSHC is a tribal organization rather than a Federally recognized Tribe and as result, is not eligible for Grant Funds pursuant to 25 CFR, § 272.

(iii) The Bureau may redesign or consolidate operations involving non-contracted programs or parts of programs.

The non-contracted portion of the Social Services Program at the Nome Agency is limited to one GS-7 Social Worker. We do not consider it practicable to redesign, or consolidate this operation at this time because future ('83 & '84) funding cuts will probably dictate more massive organizational consolidations between the Nome and Fairbanks agencies. This consolidation would involve, more than just the Social Services Program and as such, to make a one-program, redesign/consolidation effort in order to fund this proposal is at best premature, and at worst, detrimental to the quality of direct services provided because until we know the exact future funding levels, such a decision now may not be in the best interest of the clients served by the Nome Agency. We do not consider this a viable alternative.

(iv) The tribe(s) may redesign the contract proposal or consolidate all or parts of the proposal with other tribal programs.

The Bureau of Indian Affairs does not have any existing contracts with NSHC pursuant to P.L. 93-638. Since NSHC does not operate other Bureau programs, under contract or otherwise, NSHC cannot consolidate this program with other Bureau programs. It is, therefore, difficult to envision a redesigned or consolidated proposal which would result in funding savings.

(v) The tribe(s) may obtain additional funds from sources outside the Bureau to supplement the Bureau funds available to finance the proposal.

It is our understanding that NSHC has already sought additional funds from outside sources. The difficulty in this case is that there are no Bureau funds available to supplement these other sources. We therefore do not view this as a viable alternative.

(vi) The tribes(s) may accept lower services levels under the proposed contract or under the noncontracted programs or parts of programs, except where such lower levels are inconsistent with the requirements of regulations or statutes, through reallocation or reprograming of Bureau funds.

Upon analysis and review we have concluded that the level of Direct Social Services is presently at the lowest service level practicable. To reduce it any further would certainly be a diminishment of services, particularly to the Native people of Deering. This would violate section § 271.12,(a), (1), since we are not in receipt of a request from Deering, nor any of the other villages provided direct Social Services from the Nome Agency, to reduce or lower services as a direct result of the Norton Sound proposal. We do not consider this a viable alternative.

(vii) The tribe(s) may choose to withdraw the contract proposal and allow the Bureau to continue to operate the program either as presently operated or as redesigned by the tribe(s).

A continuation of the current Bureau-operated program is, of course, one alternative. We are open to suggestions for redesigning that program should NSHC have any suggestions.

We regret that settlement resolutions have not been fruitful. If you wish to obtain new resolutions, we suggest that you wait until the Departmental budget has passed so that we can give you more precise information on the availability of funding.

Sincerely,

for Jacob Lestenkof
Area Director, JAO

RECEIVED APR 2 1981

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Social Services

APR 16 1981

Mr. S. Bobo Dean
Fried, Frank, Harris, Shriver and Kampelman
Suite 1000
600 New Hampshire Avenue, NW
Washington, D.C. 20037

Dear Mr. Dean:

This refers to your March 4 request that the pending Norton Sound Health Corporation social services application be transferred from the Juneau Area Office to the Central Office level in accordance with 25 CFR 271.28.

The pending application has been transferred as per your request and we have now completed our review of the overall file.

25 CFR 271.12 Contractable Bureau Programs provides in part that "Tribal organizations are entitled to contract with the Bureau to plan, conduct, and administer all or parts of any program which the Bureau is authorized to administer for the benefit of Indians."

In accordance with the above we must advise that the Norton Sound Health Corporation program as proposed is not contractable under 25 CFR 271 - Contracts Under Indian Self-Determination Act.

The reason this proposal is not contractable under 25 CFR 271 is that the Bureau is neither authorized nor funded to provide mental health services and subsequently does not staff mental health positions. In this regard we refer specifically to the contract applicant's request that the Bureau enter into a contract to provide a "Child/Family Therapist" in a mental health setting.

It is most certainly true that the Bureau does employ social workers who do provide a certain level of counseling to individuals and families. However, this counseling is generally limited to evident individual or family problems which do not require therapeutic treatment resulting in significant behavior modification. Bureau social workers are neither employed nor expected to work with clientele on such a psychotherapeutic level. In order to obtain this kind of service for its social services clientele the Bureau is obliged to look to the Indian Health Service, U.S.

Public Health Service. Under existing law the Indian Health Service has responsibility for the medical and hospital care of Indian people. This responsibility includes care or treatment for alcoholism, other forms of drug abuse and mental health services. .

If the Norton Sound Health Corporation is not satisfied with this action they may request either an informal conference or a formal hearing in accordance with the provisions of 25 CFR 271.81.

Sincerely,

Theodore C. Krenzke

Acting Deputy Commissioner of Indian Affairs

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
SUITE 1000
600 NEW HAMPSHIRE AVENUE, N. W.
WASHINGTON, D. C. 20037
(202) 342-3500
CABLE "STERIC WASHINGTON"
TELEX 892406

FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON

WRITER'S DIRECT NUMBER IS
202-342-3589
OUR REFERENCE
9192-001

March 4, 1981

Mr. Jose A. Zuni
Area Director
Bureau of Indian Affairs
Juneau Area Office
P.O. Box 3-8000
Juneau, Alaska 99802

Dear Mr. Zuni:

Re: Norton Sound Health Corporation

I am writing to you at the request of our client, the Norton Sound Health Corporation, to bring to your attention, a matter which is pending in your office and which is apparently not being handled in accordance with the applicable Federal regulations.

On April 16, 1980 our client filed with the Bureau an application for a contract to provide social services, including in particular, family and community services to assist families with children in "high risk" situations due to inadequate living conditions (parental mental illness, alcohol/drug abuse, etc.) through counseling by a qualified child therapist. The submission of this application followed the identification of this program as a high priority need of the Alaska Native Nome Agency service population.

Apparently, a question was then raised by the Bureau as to whether the Norton Sound Health Corporation qualified as a tribal organization to request a contract under Public Law 93-638. That question was answered in the affirmative by your Regional Solicitor in a memorandum, dated October 2, 1980 (see enclosure A).

Following this advice on October 17, 1980, our client was advised that the application had been received in your office from the Agency and that a "written decision" would be sent to it within 30 days. See 25 C.F.R. §271.23(d). On December 19, 1980, our client received "formal" notice from you that the application had been "reviewed and approved in accordance with 25 C.F.R. 271" and that the Area Contracting Office would be contacting it to negotiate the terms and conditions of the contract. See enclosure B. On January 14, 1981 our client received further notice of approval from the Area 638 Contracts and Grants Officer, which apologized for "the long delay" and stated: "The Area Review Process has been completed and the contract will be awarded within the next 30 to 45 days." [Emphasis added.]

However, on January 19, 1981, our client received a telephone call from the Area Director of Admissions and the Agency Superintendent and was informed that the Bureau had changed its mind and that the application "would be declined" on the ground that the scope of work was "outside the scope of the BIA." On February 2, 1981, almost ten months after submission of the application, our client received a letter, dated January 21, 1981, from the Acting 638 Contracts and Grants Officer which stated that the application is "inappropriate for funding under current policy" and further expressed sincere regrets "at any inconvenience this rejection has caused your organization." See enclosure C. Our client requested a delay in the issuance of a formal written declination so that an attempt could be made to resolve the matter informally. See enclosure D. However, it was advised on February 5 that the request was too late and had arrived "after the written declination letter was issued." See enclosure E.

Our client has requested us to review its legal rights in the light of this record, the provisions of 25 Code of Federal Regulations Part 271, and the fact that our client, as the Bureau is fully aware, has employed a child psychologist for the program since October 1, 1980 and has incurred substantial expenditures in reliance on the Bureau's formal notice of approval issued in accordance with 25 C.F.R. 271.23(d)(4). See enclosure F.

We have reviewed the requirements of 25 C.F.R. §271 and have reached the following conclusions.

The time limits specified in §§271.22 and 271.23 for action on the application at the Agency and Area levels had, of course, long since expired before formal action was taken at either level on the application. Our client could, therefore, have acted under §271.28 to move the matter to the Commissioner's level.

However, no such action was taken and on December 19, you approved the application under §271.23(d)(4). Under the regulations the effect of this approval is a finding on your part that "funds are available to adequately finance the proposed contract without significantly reducing services under the non-contracted programs and there are no declination issues." Under the regulations you are required "to negotiate and award the contract within 30 days of notifying the applicant unless a later date is requested by the applicant."

As the thirty days have expired and our client has not requested a later date, our client is now entitled to move the matter to the Commissioner's level under §271.28 for the negotiation and award of the contract.

The telephone call of January 19, 1981 and the letter of January 21, 1981 are an apparent attempt to decline the contract application out of time. However, the attempt to decline fails in a variety of respects to conform to the requirements of 25 C.F.R. §§271.23 and 271.24, in addition to having been made following expiration of the 30-day time limit imposed by §271.23(d).

First of all, your authority under the regulations does not extend to declining a contract application submitted under Public Law 93-638. Your authority is expressly limited under §271.24 to making a recommendation to the Commissioner that the application be declined. Under §271.23(d)(5) you are required, in case you believe that declination issues exist which must be resolved, to provide a notice to the applicant which (1) lists the declination issues identified by the Area Director, (2) the reasons for the determination, (3) a copy of any documents used in arriving at the issues, (4) recommendations for resolving the issues and (5) the technical assistance available for the purpose. As Ms. Roberts letter of January 21, 1981 does not conform to these requirements, it cannot serve as a notice in compliance with §271.23(d)(5) even if it had been delivered within the required period.

At this point I should add that our client has also received a letter from the Agency Superintendent, dated February 2, 1981, which states the amounts available in the F.Y. 1981 Nome Agency Social Services budget and could be read (although I must stress that its intention is not at all clear) to state that funds are not available for the program requested in the allocation. (See enclosure G).

Federal regulations are, however, very specific as to the action to be taken by the Area Director if he considers that funds are not available to adequately finance the proposed contract without significantly reducing services under the non-contracted programs. See 25 C.F.R. §271.23(d)2(i). Among other things, he is required to offer alternative solutions to the funding problem. The letter of January 21, 1981 clearly does not conform to these requirements and, in any event, has been described by your office as a "declination letter."

In view of the foregoing we have concluded that the Bureau is not now authorized by its own regulations to decline the contract application and, on behalf of the Norton Sound Health Corporation, we formally request pursuant to §271.28 action by the Commissioner of Indian Affairs to negotiate and award the contract based on the Area Director's approval of the application received by our client on December 19, 1980. We respectfully request that all materials pertinent to this matter be forwarded by you to the Acting Deputy Commissioner, Mr. Krenzke, and a copy of this letter is directed to him as an official request for action under §271.28.

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN

By ______________________

Encls.
cc: Mr. William Dann
Mr. Donald Asbra
Mr. Raymond Butler
Mr. Theodore Krenzke
Mr. Jay Suagee

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Nome Agency Office
P.O. Box 1108
Nome, Alaska 99762

February 2, 1981

Mr. William M. Dann
Executive Director
Norton Sound Health Corporation
P.O. Box 966
Nome, Alaska 99762

Dear Mr. Dann:

In response to your request for information on our Social Services Program, enclosed is an excerpt from Title 25.

I have requested additional information from Juneau Social Services and they are sending copies of the manual which I will forward to you.

Presently our '81 budget is: 456,200 for General Assistance, 1,720 for Child Welfare and 29,500 for Miscellaneous Services.

Please note that we do not perform services under Section 20.24 Family and Community Services. You cannot contract to use our present allocation for services under this section. All other services are contractible and it is probably possible to move monies from one category to another. I am not sure on this last point, but it could be established if your interest reaches the contract negotiation stage.

Sincerely,

Walter T. Featherly
Acting Superintendent

RECEIVED

cc: Social Services, Nome
Social Services, Juneau

Enclosure

NSHC
NORTON SOUND
HEALTH CORPORATION

P.O. BOX 966
NOME, ALASKA 99762
(907) 443-5411

Memorandum

TO : BIA Social Service Contract File

DATE: January 28, 1981

FROM : Bill Dann

SUBJECT: Telephone Conversation with Gene Powers
and Walt Featherly on January 19, 1981

On January 19 I received a conference call from Mr. Gene Powers, Deputy Commissioner for Administration, BIA, Juneau, and Walt Featherly, Superintendent BIA, Home. In the conversation Mr. Powers indicated that it had been determined by the Area Contract Officer that the the scope of work in the Norton Sound Health Corporation proposal for Social Services was outside of the scope of the BIA. Rather, those services proposed in the contract were authorized only to the IHS by Congress.

Mr. Powers indicated that we could discuss with Mr. Featherly the possibilities of contracting in the future but that this specific proposal would be declined. A letter confirming this would be forthcoming from his office.

He further expressed his regrets for the extensive delay of well beyond one year in receiving a final answer on this proposal and further regretted the notification on October 17 and January 12 that our proposal had been approved for contract.

CC: Sharon Walluk

RECEIVED FEB 0 2 1981

NSHC
HEALTH CORPORATION
P.O. BOX 966
NOME, ALASKA 99762
(907) 443-5411

January 28, 1981

Gene Powers
Deputy Commissioner for Administration
Bureau of Indian Affairs
Juneau Area Office
Juneau, AK 99802

Dear Mr. Powers,

This is to follow up on our telephone conversation of January 19 in which you formally advised Norton Sound Health Corporation of your intent to decline our proposal to contract for a portion of the social services function in the Nome district. At that time, I indicated some concern as to the legality of that declination given the time period extending well over a year since the original proposal was submitted and the fact that we had received two formal notices that a contract award would take place.

Upon counsel with our attorney, S. BoBo Dean, Washington D.C., (firm of Fried, Frank, Harris Shriver and Kampelman) he recommended that I contact you to request a delay in the formal written declination until such time as Mr. Dean had an opportunity to discuss the matter with you.

In a telephone conversation on January 27 (a follow up from an attempted telephone conversation on January 26), I talked with Betty Wilkerson, who is acting in your behalf, to request the delay. She advised me that you would be in the office on the 28th and that she would discuss the matter with the Contract Administrator on the 27th.

I further advised Ms. Wilkerson that discussions were taking place locally with Mr. Featherly regarding a future contracting possibility.

Your consideration of our request for a delay in the formal notice of declination is appreciated.

Sincerely,

William M. Dann
William M. Dann
Executive Director

CC: S. BoBo Dean

WMD:lk

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Juneau Area Office
P. O. Box 3-8000
Juneau, Alaska 99802

RECEIVED
[illegible] 1981
NORTON SOUND
HEALTH CORPORATION

January 21, 1981

Norton Sound Health Corporation
Mr. William M. Dann, Executive Director
P. O. Box 966
Nome, Alaska 99762

Dear Mr. Dann:

Per the telephone conversation of January 19, 1981, it was determined by the Bureau of Indian Affairs Social Services that your P.L. 93-638 contract application, to provide a Child/Family Therapist, is inappropriate for funding under the current policy.

The responsibility for medical and hospital care for Indian people was transferred from the Bureau of Indian Affairs to the Department of Health, Education and Welfare in 1955. The Indian Health Service, U.S. Public Health Services, has been created with that department to assume this responsibility.

Therefore, the Branch of Contracts and Grants is not authorized to issue a contract to The Norton Sound Health Corporation, as specified in your application. It has been determined by the Office of the Solicitor that your organization is an eligible applicant to contract with the Bureau of Indian Affairs for programs which are appropriate under P.L. 93-638.

We sincerely regret any inconvenience this rejection has caused your organization, but know you also wish to conform to current policies under P.L. 93-638.

Sincerely,

James W. Griffin, Acting
for
Carmel Roberts
638 Contracts and Grants Officer

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. 6817828

ALASCOM

Telegram

RECEIVED
JAN 1 4 1981
NORTON SOUND
HEALTH CORPORATION

02005 TDA JUNEAU ALASKA 102 01-12 0705A AST

PHS EXECUTIVE DIRECTOR NORTON SOUND HEALTH CORP
PO BOX 966 01163
NOME AK 99762

RE YOUR 638 CONTRACT APPLICATION TO CONTRACT FOR PROVIDING SOCIAL SERVICE SUPPORT SERVICE. WE HAVE RECEIVED A SOLICITORS OPINION STATING THAT THE NORTON SOUND HEALTH CORPORATION IS AN ELIGIBLE APPLICANT PURSUANT TO 25CFR271.11 SO WE ARE THEREFORE PROCESSING THE APPLICATION. WE APOLOGIZE FOR THE LONG DELAY. THE AREA REVIEW PROCESS HAS BEEN COMPLETED AND THE CONTRACT WILL BE AWARDED WITHIN THE NEXT 30 TO 45 DAYS. SPECIFICATIONS ARE PRESENTLY BEING PREPARED BY THE AREA SOCIAL WORKER WHO MAY BE IN CONTACT WITH YOU REGARDING THE PROGRAM. IF YOU HAVE ANY QUESTIONS, PLEASE FEEL FREE TO CONTACT OUR OFFICE AT 586-7296.

CARMEL ROBERTS, 638 CONTRACTS AND GRANTS OFFICER
BIA

NSHC

December 12, 1980

Paul Sterling, Administrator
BIA Area Office
Nome, AK 99762

Dear Mr. Sterling:

As a follow-up on our phone conversation of 12/9/80, we are concerned that the contract for the services of the child psychologist be prepared as soon as possible, as we have had this individual on staff for some time and need to bill from October 1, 1980. We hope there will be no problem with this although the approval of the proposal was very late, it was through no fault of Norton Sound. It was delayed because 1.) BIA had questions about the status of NSHC as a tribal organization and ended up asking for the opinion of the BIA solicitor, who ruled in our favor. 2.) The area superintendent position was meanwhile filled by several temporary people, who felt they needed to review the proposal individually. 3.) The proposal was lost twice by BIA personnel and we had to prepare duplicates.

In conclusion, a great deal of time has passed by since we submitted the proposal originally on April 16, 1980, and we have incurred a lot of costs in a position which is being utilized very successfully by the community.

Thank you very much for anything you can do to expedite this matter and to assure that we can be reimbursed from October 1, 1980.

Sincerely,

Nancy M. Mendenhall

Nancy M. Mendenhall
Community Health Services Director

NMM:sp

cc: Sharon Walluk
Charles Saxie
Carmel Roberts

BEST COPY AVAILABLE

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Juneau Area Office
P. O. Box 3-8000
Juneau, Alaska 99802

RECEIVED
DEC 1 1980
NORTON SOUND
HEALTH CORPORATION

CERTIFIED NO. 219828
RETURN RECEIPT REQUESTED

Executive Director
Norton Sound Health Corporation
P.O. Box 966
Nome, Alaska 99762

Dear Sir:

This is to formally notify you that your P.L. 93-638 contract application for providing Social Service Support Services has been reviewed and approved in accordance with 25 CFR 271. However, approval of an actual contract will not occur until the term and conditions have been agreed to and signed by the Contracting Office.

The application is presently being processed through our 638 Contracting Office, who will be in contact with you in the near future.

If you have any questions, please feel free to contact our office through the Nome Agency Superintendent.

Sincerely,

C. L. H

for Jose' A. Zuni
Area Director

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Juneau Area Office
P. O. Box 3-8000
Juneau, Alaska 99802

October 17, 1980

RECEIVED
OCT 2C 1980
NORTON SOUND
HEALTH CORPORATION

Certified Mail No. 0334631
Return Receipt Requested

Executive Director
Norton Sound Health Corporation
P.O. Box 966
Nome, Alaska 99762

Dear Sir:

This is to formally notify you that your P.L. 93-638 contract application for providing Social Service Support Services has been forwarded to our office by the Nome Superintendent.

The application will be reviewed for compliance in accordance with 25 CFR 271 and a written decision will be sent to you within the next thirty (30) days. ✓

Sincerely,

Area Director

United States Department of the Interior
OFFICE OF THE SOLICITOR
ANCHORAGE REGION
510 L Street, Suite 408
Anchorage, Alaska 99501

COPY
IN REPLY REFER TO:

October 2, 1980

MEMORANDUM

To: Area Director
Bureau of Indian Affairs
Juneau Area Office

From: Attorney-Advisor
Office of the Regional Solicitor
Alaska Region

Subject: Status of Norton Sound Health Corporation
As A Tribal Organization Pursuant to P.L. 93-638

INTRODUCTION

You have asked this office for a legal opinion on the status of Norton Sound Health Corporation as a tribal organization pursuant to the Self Determination Act, P.L. 93-638, 25 U.S.C. § 450 *et seq*. and the implementing regulations at 25 CFR 271 *et seq*. Ater a review of the materials submitted with your opinion request and a consideration of the problems raised, we have come to the conclusion that Norton Sound Health Corporation should be considered an eligible P.L. 93-638 applicant under 43 CFR § 271.11.

APPLICABLE LAW

The pertinent law is as follows:

> *Any tribal organization is eligible* to apply for a conract or contracts with the Bureau to plan, conduct, and administer all or parts of Bureau programs under section 102 of the Act. However, before the Bureau can enter into a contract with a tribal organization, it must be requested to do so by the Indian tribe or tribes to be served by the

> contract in accordance with § 271.18. (Emphasis added.)

25 CFR § 271.11.

> "Tribal organization" means the recognized governing body of any Indian tribe; or any legally established organization of Indians or tribes which is controlled, sanctioned, or chartered by such governing body or bodies or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; Provided, That a request for a contract must be made by the tribe that will receive services under the contract; Provided further, That in any case where a contract is let to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting of such contract. (Emphasis in original.)

25 CFR § 271.2(r). Also see, 25 U.S.C. § 450b(c).

DISCUSSION

In this instance, Norton Sound Health Corporation is not only considered the "health arm" of the Bering Straits Native Corporation (see attached copy of letter of July 14, 1980), which is a recognized Indian tribe [see, 25 U.S.C. § 450b(b) and 25 CFR § 271.2(h)], but the Norton Sound Health Corporation is controlled, sanctioned and chartered by other tribal governing bodies. Specifically, the Bylaws of the Norton Sound Health Corporation provide that:

> The following villages shall each be represented on the Board by the election of one director by each IRA Council and in the absence of an IRA Council, by the City Council: [1] Shismaref, [2] Wales, [3] Teller, [4] Brevig Mission, [5] White Mountain, [6] Golovin, [7] Elim, [8] Gambell, [9] Savoonga, [10] Koyuk, [11] Shaktoolik, [12] Unalakleet, [13] Stebbins, [14] St. Michael, [15] King Island Village, [16] Diomede. [17] Nome Eskimo Community shall elect two representatives.

Fourteen (14) of those villages have IRA Councils, while Teller, Brevig Mission and Golovin are second-class cities with City Councils and no IRA Councils. The Nome City Council also elects one Board member, three additional Nome representatives are elected by the Board of Directors and the Executive Director serves on the Board ex-officio. Consequently, 15 Board members are elected by tribal governing bodies while 4 members are elected by City Councils and 3 more members are elected by the rest of the Board.

Since the Bylaws for the Norton Sound Health Corporation also spell out that "[t]he management of the property, funds, affairs and business of this Corporation shall be vested in a Board of Directors consisting of..." the members listed above, there can be no doubt that the corporation is controlled by tribal governing bodies. Also see, Alaska Statutes 10.20.081 which provides that the affairs of a corporation shall be managed by a board of directors.

While 25 CFR § 271.2(r) requires that an organization be alternatively either controlled, sanctioned or chartered by a tribal governing body or bodies, in this instance we find that Norton Sound Health Corporation, in addition to being controlled by, is also sanctioned and chartered by such tribal governing bodies. In short, we agree with the conclusion set forth in your memorandum of August 12, 1980 "...that the resolutions which accompanied it [the initial application to contract] satisfied the requirement that the organization be 'chartered' by the tribal governing bodies to be served." These resolutions also show that Norton Sound Health Corporation is sanctioned by the tribal governing bodies it serves. Moreover, the representation of the 14 tribal governing bodies on the Board of Directors of Norton Sound Health Corporation is further evidence that the corporation is both sanctioned and chartered by the appropriate tribal governing bodies. This representation also shows that the operation and management of the North Sound Health Corporation includes the maximum participation of Indians in all phases of its activities.

This conclusion is consistent with the Field Solicitor's legal memorandum of January 5, 1977 which found:

> On the basis that the various Tlingit and Haida Community Councils are established organizations that are "controlled, sanctioned, or chartered" by the Central Council of Tlingit and Haida Indians of Alaska it follows that each community council is a "tribal organization" within the meaning of ... [P.L. 93-638]

Tlingit and Haida Community Councils and Second Class City Councils Status Under P.L. 93-638, unpublished Memorandum of the Field Solicitor, Juneau (January 6, 1977). This opinion has been construed to mean, at a minimum, that:

> ...nonprofit regional and subregional Native associations would be included as "tribal organizations" under the Field Solicitor's interpretation, *so long as those associations are controlled*, *sanctioned*, *chartered* ... *by tribal governing bodies*. Thus, these organizations, as well as the governing bodies with which they are associated, are eligible to receive grants and contracts to provide BIA educational programs and services. (Emphasis added.)

Case, *The Special Relationship of Alaska Natives to the Federal Government: An Historical and Legal Analysis*, 73, (1978). Since Norton Sound Health Corporation is controlled, sanctioned and/or chartered by tribal governing bodies, it seems quite clear that they are eligible P.L. 93-638 applicants under the requirements of 25 CFR § 271.11 and as defined by 25 CFR § 271.2(r).

You have also asked whether the Norton Sound Health Corporation is a "legally established organization of Indians" within the meaning of 25 CFR 271.2(r) since nontribal governing bodies (i.e., Nome and other State chartered city councils) appoint members to the Board of Directors. We note first, that 25 CFR 271.2(r) interprets 25 U.S.C. 450b(c) to include "legally established organization of Indians *or tribes*" (emphasis added). Second, other than Nome, *apparently* only three nontribal city councils (i.e., Teller, Brevig Mission and Golovin) appoint members to the Board. The 14 other communities named in Norton Sound's Bylaws are all represented by IRA councils, which together appoint 15 Board members.

We think it is fair to say that an organization is a "legally established organization of Indians or tribes" for P.L. 93-638 purposes when tribal governments directly appoint 15 of its members and nontribal governments appoint only 4. Under the circumstances, it is irrelevant that the Board itself elects three members and that the Executive Director is an ex-officio Board member. The crucial facts are that Norton Sound Health Corporation is an organization of tribal governments, and it is controlled by those governments, not that some of its Board members may in fact be racially non-Native. The special status of Native Americans under federal law is based on their unique political relationship to the federal government, not their distinctive race. *See*, *e.g.*, *Morton v. Mancasi*, 417 U.S. 535 (1974).

This is consistent with the purpose of P.L. 93-638 which is to promote and provide for Indian participation in projects and services conducted by the federal government for Indians and to support the right of Indians to control their own activities. See, 1974 U.S. Code Cong. & Adm. News, 7775 and 7776. In short:

> The declarations in and legislative history of P.L. 93-638 amply show that the main purpose of self-determination is to put decision making power in the hands of those who benefit from government Indian services.

Gross, Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy, 56 Texas Law Rev. 1195, 1219 (1977). This purpose would, however, be frustrated in this instance if the legally established organization, the Norton Sound Health Corporation, which is controlled, sanctioned and/or chartered, by 14 tribal governing bodies was denied eligibility to contract under P.L. 93-638.

In addition, safeguards to insure against contracts being entered into by unacceptable organizations exist at 25 U.S.C. § 450b(c), and 25 CFR §§ 271.11 and 271.18. In specific, the tribal governing bodies for each of the tribal governing bodies currently controlling, sanctioning and/or chartering the Norton Sound Health Corporation could prevent the corporation from contracting for services benefiting their members by refusing to request or approve the contract. Id.

CONCLUSION

Given these considerations, this office is of the opinion that the Norton Sound Health Corporation is an eligible applicant pursuant to 25 CFR § 271.11.

Dennis J. Hopewell

Dennis J. Hopewell

Enclosure:

Copy of Letter of July 14, 1980 from
Bering Straits Native Corporation

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Juneau Area Office
P. O. Box 3-8000
Juneau, Alaska 99802

IN REPLY REFER TO:
Social
638

JUL 18 1980

Norton Sound Health Corporation
P. O. Box 966
Nome, Alaska 99762

Gentlemen:

This letter is to confirm my statements to you during our meeting in Nome on July 10 and 11 concerning your proposal to contract for a part of the Bureau's Social Services program pursuant to authorities under P.L. 93-638.

Your proposal has been reviewed by the Juneau Area office of Social Services, at the request of the Nome Agency Superintendent. As I understand their communication back to the Agency, they have found no technical problems with the program aspects of the proposal which could possibly raise a declination issue. During our meeting in Nome on July 10, the Agency and I discussed the availability of funding to the Agency for Social Services for FY 81. The Agency did confirm to you that an amount of $26,000.00 did appear available for the proposed contract. Of course, as you are aware, funding presently identified as available for FY 81 is tentative at this time and no firm commitment can be made to you in this regard until FY 81 appropriations are passed by the Congress and signed into law by the President.

At present, your application must still be reviewed by the Agency Superintendent to insure its full compliance with all requirements under 25 CFR 271 and to insure that there are no declination issues outside of the program part. Upon completion of his review, the Superintendent will then forward the application, with his recommendations, to the Juneau Area Director for his review and decision to either award the requested contract or to recommend declination to the Commissioner of Indian Affairs. In any event, throughout this process, you will be notified in writing of the status and decisions or recommendations, as required under 25 CFR 271.22 and 271.23.

One issue which must be resolved before a decision can be made to contract under P.L. 93-638 is the question as to whether The Norton Sound Health Corporation does, in fact, qualify, under the statutory definition, as a Tribal Organization. As I advised you, we have had no prior relationships with The Norton Sound Health Corporation in which this status was established. Given some of the information we do have concerning the charter, constitution, by-laws, etc., we do feel that we must ask you to provide to us such documents as you may have which will confirm, in your view, your status as a Tribal Organization. In our meetings, you did agree to provide us with this material by mail as soon as possible.

Upon receipt of the above material, we shall forward it to the U.S. Department of the Interior, Office of the Field Solicitor in Anchorage and request a formal opinion as to whether, in view of all available information, the existing legislation and regulations, and legislative intent, The Norton Sound Health Corporation does in fact meet the statutory requirements for recognition by the Bureau as a Tribal Organization. We shall request that the Field Solicitor's Office respond to other related questions in this matter, should that office reach an opinion that The Norton Sound Health Corporation does not meet the requirements. In any event, upon receipt of a formal opinion, we will make a copy available to you for your information and so you may also then proceed with any actions you may feel appropriate to the organization's best interests. With the copy of the opinion, we shall also cite to you any other procurement options (other than P.L. 93-638) which may be available by which we might mutually accomplish the program intent of your organization as requested by resolutions of the villages to be served under the proposed contract.

Please be assured that, during the period necessary to resolve the above question, we will continue to process your application through the review process. As I advised you, I presently feel there is sufficient time to accomplish all of this and, if allowable, award a contract reasonably close to October 1, 1980.

Should you have any questions during this period, please feel free to contact me by phone in Juneau (586-7120).

Sincerely,

Robert T. Elliott
Acting Contract Administrator

RECEIVED
JUL 21 1980
NORTON SOUND
HEALTH CORPORATION

Fort Belknap Community Council

FORT BELKNAP EDUCATION DEPARTMENT

(406) 353-2205
P.O. Box 39
Fort Belknap Agency
Harlem, Montana 59526

Fort Belknap Indian Community
(Tribal Govt.)
Fort Belknap Indian Community
Elected to administer the affairs of the Community and to represent the Assiniboine and the Gros Ventre Tribes of the Fort Belknap Indian Reservation)

1982 JUN 18 AM 8 29

RECEIVED JUN 18 1982

June 14, 1982
DATE

Honorable John Melcher
The United States Senate
253 Russell Senate Office Building
Washington, D.C. 20510

Dear Honorable Melcher:

Enclosed is a position paper developed by Dr. Robert J. Swan, Fort Belknap Tribal Education Department, concerning problems we are facing with contracting the Higher Education Program from the Bureau of Indian Affairs.

It would be greatly appreciated if you could submit this paper to the Senate Indian Affairs Committee oversight hearing on P.L. 93-638 (Indirect Costs; Grants & Contracts Administration) scheduled for June 23, 1982. Further, I am requesting that the U.S. Senate resolve this problem as soon as possible because the Fort Belknap Reservation has lost $31,392. in program administration funds for Fiscal Year 1982.

Thank you very much for any support you can grant the Fort Belknap Indian Community.

Sincerely,

Henry Brockie, Sr., President
Fort Belknap Community Council
Fort Belknap Agency
Box 39
Harlem, Montana 59526

Enclosure:

hb:rm

PUBLIC LAW 93-638 CONTRACTING PROBLEMS WITH THE BUREAU OF INDIAN AFFAIRS - HIGHER EDUCATION PROGRAM

A. AUTHORIZATION:

25 USC 13 (the Snider Act of November 2, 1921) is the basic authority under which the Secretary provides services, including education to Federally Recognized Indians.

25 USC 450, Section 104a (the Indian Self-Determination Act of 1975) provides authority for grants to tribal governments for a wide variety of purposes, including the contracting of the Higher Education Program.

B. FISCAL YEAR 1982 BUDGET:

The U.S. House of Representatives and the U.S. Senate Conference Committees transferred $754,000. in P.L. 93-638 Contract Funds and $1,000,000. in Program Management funds to the Indian School Equalization Formula (ISEF).

C. ELEMENT 10:

Within the Bureau of Indian Affairs budgeting system, two major elements are used to fund the Higher Education Program:

1) Element 10 - Program Management
2) Element 13 - Scholarship Funds

Traditionally, when an Indian tribe contracted under Public Law 93-638, they contracted for the Element 10 (Program Management Funds) and Element 13 (Scholarship Funds). In addition, the tribe is provided funds underneath Public Law P.L. 93-638 for Program Support funds or Indirect Costs for the overall administration of the program. Most tribes Indirect Cost rate is very low and funds are utilized for Central Administration, Tribal Council's expenses, the general operation of all contracts with the Bureau of Indian Affairs, etc.

D. MAJOR PROBLEM AREAS:

The Conference Committee decided that all funds formally utilized from the Element 10 budget line items for Tribal Contracts should be moved into the formula funding (ISEF established by P.L. 93-638). Specifically, the U.S. Congress agreed to have the Bureau moved $754,000. in Public Law 93-638 Contract Funds and $1,000,000. in Program Management Funds to the ISEF formula.

The zeroing out of Element 10 for tribal programs for tribes who have utilized Element 10 Funds to administer their Higher Education Program are now forced to take administrative funds from the Scholarship Account (Element 13) that are intended for the education of Indian students. This decision will have a devastating effective on tribal self-determination during FY83 and future years. It is the belief of this author that after meeting with the House Committee on Education & Labor, the House Appropriations Committee, the Senate Select Committee on Indian Affairs and the Senate Appropriation Committee in January of this year, that they did not intend to eliminate tribal attempts to develop their own administrative structures, systems, and processes to carry out a cohesive and successful education program on Indian reservations.

It was reported to the author that the intent of the Congress was to avoid duplication of funding and that tribes could utilize program management funds within the ISEF formula. However, since a number of tribes do not operate school systems and do not receive ISEF funding, it is not approprate for these tribes to be included in the ISEF budget. The majority of these tribes depended upon Element 10 funds for the administration of supplemental education programs, including the administration of the Johnson-O'Malley, Adult Education and Higher Education Programs at the local level. Rather than to correct the program, the BIA has intrepreted the language and Conference Report to mean that these Public Law 93-638 Contracts Administrative Funds were intentionally eliminated by the Conference Committee. To date there has been no request from the BIA to correct this problem.

E. BILLINGS AREA OFFICE EXAMPLE:

BIA ELEMENT 10	FY81	FY82
Area Office	$97,938.	$80,754.
Blackfeet	$21,000.	$20,242.
Crow	$50,650.	$51,848.
Fort Belknap	$ 7,754.	-0-
Fort Peck	$41,000.	$28,135.
Rocky Boy's	$11,230.	-0-
Wind River	$17,838.	$15,489.

TRIBAL CONTRACTORS

Element 10		
Fort Belknap	$30,084.	$ 6,446.
Northern Cheyenne	$65,490.	$15,717.
Flathead	$78,510.	$19,220.
Rocky Boy's	$ 9,480.	$10,357.
Wind River	$12,389.	$ 2,975.

F. FORT BELKNAP EXAMPLE:

During the FY81 fiscal year the Fort Belknap Reservation was funded at $37,838. for Element 10. During the FY82 year, only $6,446. was made available to the Fort Belknap Community Council under Element 10 to absorb expenses up to 12-23-81 (the day President Reagan signed the Interior Appropriations budget). As a result, the Fort Belknap Community Council lost $31,392. in Element 10 funds which must be replaced from Scholarship Funds (Element 13). In addition, this will result in approximately 12 students being cut from the program because program administration must be absorbed in the Element 13 account.

G. BILLINGS AREA OFFICE:

During the FY81 budget period the Billings Area Office was funded at $97,938. from Element 10 for administration of education programs in the Billings Area Region. During FY82, the Area Office was cut by $17,184. to $80,754. to administer education programs in the Billings area. However, Fort Peck Agency's Higher Education Program is currently being administered by the Billings Area Office and the majority of the $28,135. budgeted for Fort Peck is being utilized in the Billings Area Office for administration. Thus, it appears that there was no cut made in the Area Office as originally intended by the U.S. Congress.

H. SOLUTIONS TO THE PROBLEM:

1. Bureau of Indian Affairs transfer fiscal year 1982 administrative funds to Element 10 for P.L. 93-638 contracts.
2. U.S. Congress appropriate sufficient funds to replace Element 10 funds in fiscal year 1983 and subsequent fiscal years for P.L. 93-638 contracts.

In conclusion, if Element 10 funds are not replaced by other funds, self-determination is a farce and Indian Tribes will not be able to successfully develop Indian Education programs.

Robert J Swan
Dr. Robert J. Swan, Director
Fort Belknap Tribal Education Department

June 14, 1982
(Date)

NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION

Suite 910 • 1010 Vermont Avenue, N. W. • Washington, D. C. 20005 - 4949
202 – 737-7011

Testimony Of

THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION

Presented to
The Senate Select Committee on Indian Affairs
June 30, 1982

On

The Implementation of the Indian Self-Determination
and Education Assistance Act

Mr. Chairman, the National Tribal Chairmen's Association portion of this hearing today will focus on major points of interest. In an effort to keep our presentation to a reasonably short one we will submit additional comments in writing to your Committee within a few days.

First, we want to address the draft revisions of PL 93-638 regulations. In August of 1981 the Department of the Interior, using PL 95-224 as the authority, proposed a revision of existing "638" regulations. The Board of Directors of NTCA has consistently since then opposed the implementation of the new regulations on several points.

A. They are not convinced that PL 95-224 was intended to apply to Indian tribes contracting under authority of PL 93-638.

B. They do not agree with the BIA contention that changing contracts to grants would benefit the tribes or solve operating difficulties.

PL 93-638, the so-called Indian Self-Determination Act, represented to the tribes a clear and unequivocal statement and commitment by the United States to a policy of assistance to the tribes in a manner approved by the tribes themselves. After all, it is true that the tribes assisted in the development of the Act itself and subsequently in the writing of the implementing Regulations. We have challenged the Interior Solicitor's memorandum of April 28, 1981, which allowed PL 95-224 supremacy and mandated revision of the regulations. It is still our contention that Interior is wrong, else why would Section 271.4(h) be needed to "affirm supremacy of (PL 95-224)"?

The use of PL 95-224 depends upon the amount of federal involvement in the GRANT or COOPERATIVE AGREEMENT. The tribes should be allowed to make the choice between the two for their own benefit. It is our thinking that the smaller tribes might prefer federal help in program management or some other way, and the use of a Cooperative Agreement would enable them to build up their administrative skills and capabilities. Section 271.23 leaves the choice only to the Commissioner.

Although the Assistant Secretary informs the tribes that the agency Superintendent "will have the authority to approve the grant application" this is misleading to the tribes. It subtly implies that the agency can approve the grant. Not so. The regulations provide for Area Office review, and possible Commissioner's review before grant approval.

Section 271.21, Approval, merely says that the "Bureau" will approve the grant request with no mention of which office would do the approving. The time frame for processing the applications does not appear to be sufficiently streamlined. In Section 271.24, it seems clear that the Commissioner must still review the grant application and a declination at that level is still possible even after review at the Agency and Area levels. If declination takes place then

Technical Assistance is offered. Sufficient TA should take place much earlier in order to prevent declination.

It would seem prudent to us to postpone final approval of these new regulations pending outcome of the proposed realignment since much of the language and office authority is based on past BIA management structure.

In short, the proposed new regulations are vague, inconclusive, and do not seem to improve the present 638 problems of implementation. Consultation and better planning need to take place before the regulations are published.

To continue, there have been inherent problems in contracting of tribal programs under "638". Not the least of which is Contract Support Funds.

Section 106H of present regulations states that the BIA shall give the tribes the same level of funding that would have been necessary had the BIA operated the program. This has not been the case. If BIA is successful in winning congressional approval to accomplish the realignment, then we recommend that the BIA be required to transfer the touted $16 million savings in administration to Contract Support. This category has been used to pay contract Indirect Costs.

A familiar statement by the BIA is that because of the possibility of tribal retrocession of a contracted program they must keep some funds in reserve to operate that program in the event of a retrocession. Why cannot those reserve funds also be used for contract support?

Contract Support, or, as tribes know it, "Indirect Costs", has been the most serious problem in contract operation. Tribes were encouraged to establish an Indirect Cost rate and at the highest rate possible. What was not explained was that a misunderstanding of the Indirect Cost process coupled with the slightest fiscal errors could lead to huge deficits, or even bankruptcy.

The BIA and IHS operation of those same programs were not in the same danger because federal agencies operate their programs at 100 percent of operational cost, but in general tribes operating those same programs are held to a maximum amount which can be used for administrative purposes and to the fixed Indirect Cost rate. Tribes actually begin to lose money after their second year of operation of the contracted program.

Other contractors such as States, Counties, or even Universities, have other revenue which can be used for Contract Support if needed, whereas those tribes who were 100 percent federally funded had to sink deeper into debt each year by a system which should have never been imposed on them. There is a definite categorical difference between most tribes and other revenue producing entities. For tribes without income the Indirect Cost system guaranteed eventual program failure. This fact was pointed out by Interiors I.G. staff over a year ago but the advice has been conveniently ignored.

The problem has reached dangerous proportions, therefore NTCA would advocate that before any new regulations are implemented,

that corrective action be taken by all concerned, and we would hold the Office of Management and Budget (who is the architect of the fiscal policies for the federal agencies) responsible to take the lead in this task. We offer the following comments and recommendations to this honorable Committee and to the Office of Management and Budget which are spelled out on the following pages.

The BIA Indirect Cost Process

The BIA, Interior Inspector General's Office, OMB and other agencies contracting with tribes have diverse definitions of indirect costs, of what is included within those costs and the percentages of funds allowable for them. Tribes, as well as BIA local agency staff, are now accustomed to one way of dealing with this most confusing issue and must be directly involved in the revision and in setting up the new codes and rules in advance of actual implementation. They must be made fully aware of plans and procedures during the interim "change-over time" so that they do not continue to lose money by contracting due to the present interpretation of indirect cost rates by the BIA and the Inspector General's audit teams. Specific time frames must be set out for the accomplishment of all tasks related to the revision of the 638 regulations and indirect cost process with tribes directly involved in each step.

NTCA fully supports the BIA's realization that both its staff and the tribal leaders must be well informed of changes in the PL93-638 regulations and specifically as they relate to the indirect cost process. We therefore recommend that the information sharing and direct tribal participation in the pre-implementation phase begin immediately.

Some of the most serious problem areas:

1. Need for a clear distinction between the term "indirect costs" and other accounting or management terms that sometimes have other meanings, such as overhead, administrative cost, etc.

   Recommendation: OMB issue a Bulletin or other release that calls attention to the unique meaning of "indirect costs" and directing that all official issuances recognize this uniqueness.

2. Contract Support vs Indirect Costs:

   (a) the majority of tribes have been "persuaded" to negotiate indirect cost rates in order to obtain Contract Support Funds. This has subjected the tribes to over-recovery losses; deficiencies in other Federal agency program funding; and extensive and costly "rate" negotiations, and additional disallowed cost controversies.

   (b) also, tribes that have not elected to use the direct-indirect costing approach do not qualify for "Contract Support" funds and therefore receive no funds for incremental (indirect) costs, as provided for by Section 106(h) of P.L. 93-638. This has been costly for these tribes since they must pay these costs either from other tribal resources, carry them on the books as deficits, or cover them temporarily by juggling accounts within the tribal accounting system.

Recommendation:

a. Discontinue the use of Contract Support funds for tribal indirect costs as such.

b. Use Contract Support funds only for additional costs to the tribes for operations of a program, which depend upon P.L. 93-638 grants for one-time costs, until such time as the full cost can be added to the overall BIA budget.

3. The motivation to shift a maximum of costs from the direct to indirect catergory to obtain a maximum share of the BIA Contract Support Fund, not only created an ever-increasing pressure on BIA to keep increasing the Contract Support Fund, it also created greater problems for the tribes in relation to grants and contracts from other Federal Agencies. The additional problems of Contract Support funding to carry out Section 106(h) of P.L. 93-638, and the lack of clear definitions of terms, created a complexity and a confusion in meaning that apparently prevented a decision on the key problem.

Recommendation:

a. Include funds for both direct and indirect Costs in all BIA P.L. 93-638 contracts, and discontinue the use of separate funds for indirect costs.

b. (or) If a separate budget item for Contract Support is continued, confine the use of the funds to the "incremental" costs incurred as a result of P.L. 93-638 contracting until such time as they can be incorporated in the regular annual budget process, and do not attempt to equate Contract Support to Indirect Costs.

4. **Extent and Scope of Tribal Financial Losses:** In an effort to determine the approximate dollar amount of tribal financial lossed, BIA asked each BIA Area Office to submit data regarding tribal deficiencies for FY-79, 80 and 81. The information received was far from complete. In handling the indirect cost negotiations using the fixed/carry forward process, including the theoretical over-recovery, the funding discrepancies disappear each year as they are rolled forward into the adjustment of the new indirect cost rate. Consequently, to identify the losses or deficiencies requires a detailed reconstruction or extensive analysis of the Account.

Recommendation:

In order to specifically identify tribal financial losses as a result of the Contract Support/indirect cost problems, BIA must issue carefully constructed detailed instructions to assume that accurate and complete data can be developed by the tribes. This data is needed before any decision can be made with respect to possible legislative or other action necessary to remedy the financial losses that have been incurred by the tribes.

Recommendations Regarding BIA Indirect Cost Rate Proposal Within the Revision of PL93-638 Regulations

1. That the BIA begin immediately working closely with all other agencies, and particularly with HHS (IHS, ANA)with whom tribes can contract under PL 93-638, their respective Inspector Generals' Offices and OMB staff to establish a standardized definition and implementation process for administration and management of indirect costs; and

2. That a task force of tribal contract administrators or managers be established, in consultation with tribal governments, to participate directly in this process; and

3. That the language of the resulting product be generally understandable English to facilitate comprehension and compliance at all levels, thus facilitating improved tribal-agency communications with regard to contract and grants management.

4. That the BIA, in joint consultation with all other federal agencies with whom tribes can contract under PL93-638, identify with tribal governments and BIA agency level contract officers their specific capacity building training needs for taking over the management and administrationof 638 contracts with the indirect cost mechanism.

5. That the BIA, in conjunction with the other federal agencies, develop and implement, at the earliest possible date, a capacity building training program to meet those identified needs prior to the implementation of the revised regulations for contracting activities.

6. That the BIA and cooperating federal agencies identify specific budget lines and funding (without reducing tribal program funds) for such capacity building training. For example, the BIA, under 638 contracts budget, has a line item for "one time start up funds". we recommend that this line item be revised and expanded if necessary to include funds for the training and technical assistance needed by tribes in planning and revising their 638 contracting activities.

Mr. Chairman, The National Tribal Chairmen's Association will stand ready as always to assist the federal agencies, and OMB, to address the problems and the recommendations which we have enumerated here this morning--- and thank you for the opportunity to present this to you today.

Elmer M. Savilla, Executive Director, N.T.C.A.

TESTIMONY OF
THE OGLALA SIOUX TRIBAL COUNCIL
BEFORE THE
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
REGARDING
P.L. 93-638, THE INDIAN SELF-DETERMINATION AND EDUCATIONAL ASSISTANCE ACT OF 1975

AUGUST 12, 1982

Oglala Sioux Tribe
Phone (605) 867-5821
Box 468
Pine Ridge, South Dakota 57770

JOE AMERICAN HORSE
President
JOHN STEELE
Vice President
[illegible] H. IRON CLOUD
Secretary
[illegible] BETTELYOUN
Treasurer
GARVARD GOOD PLUME SR.
5th Member

Office of the President
JOE AMERICAN HORSE

August 11, 1982

Senate William Cohen, Chairman
Senate Select Committee on Indian Affairs

Mr. Chairman and Members of the Committee:

The Oglala Sioux Tribal Council of the Pine Ridge Indian Reservation located in the State of South Dakota, appreciates the opportunity to have our official comments included in oversight hearings record. The Tribal Council would first choose to express concern and regret for the lateness of our input. However, this can be attributed to the general lack of communication between Bureau of Indian Affairs officials to Tribal governments on major legislative actions and administrative changes affecting Indian tribes.

We were especially concerned only to recently discover the significance of P.L. 95-224 affect on the Bureau of Indian Affairs' administration of the Indirect Cost and Contract provisions of the "Indian Self-Determination and Education Assistance Act" of January 4, 1975 (P.L. 93-638).

The Oglala Sioux Tribal Council firmly supports the concept of "Indian Self-Determination". The purpose of the Act being "To provide maximum Indian participation in the government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the federal government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities". The national Indian policy of "Indian Self-Determination" is regarded by the Oglala Sioux Tribal Council to be the most effective method to plan, conduct, and administer programs for the benefit of Indians. While the concept is endorsed by the Oglala Sioux Tribal Council, there have been instances of bureaucratic resistance, undue delays, and at times outright sabotage by the Bureau of Indian Affairs to our P.L. 93-638 contracting rights. The Oglala Sioux Tribal Council, in light of the above statement, disagrees with vesting the power of declination to the Area Director and question the scope of power the Superintendents may have in awarding grants; as provided by the proposed changes in P.L. 95-224.

BEST COPY AVAILABLE

We do endorse the "streamlining" effect of P.L. 95-244 in changing the types of awards from "contracts" to "cooperative agreements" (when necessary) and "grants". This is a vast improvement. In the past, contracting efforts involved discussing programs with technical personnel, Contracts Officers, who knew little or nothing about the needs of the Oglala Sioux Tribal government or its constituents. The discussion centered around technical terms and procedures.

Now, we feel an "award" or "agreement" system will lead to expertise and knowledge about reservation programs and peoples needs being provided in P.L. 93-638 implementation. The only pitfall to the new streamlining method would be if the "award" system would diminish federal trust responsibility.

Again, we regret we were not informed of the major effects of P.L. 95-224 on the P.L. 93-638 Contracts and Program administration of Indian programs within the BIA and the major administrative changes to comment more extensively. We will, however, provide more comments upon publication of these proposed changes in the Federal Register. The Oglala Sioux Tribal Council thanks you for your time and attention in this matter.

BEST COPY AVAILABLE

RESOLUTION NO. 82-87

RESOLUTION OF THE OGLALA SIOUX TRIBAL COUNCIL
OF THE OGLALA SIOUX TRIBE
(An Unincorporated Tribe)

RESOLUTION TO SUBMIT TESTIMONY TO THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS OVERSIGHT HEARINGS THE HONORABLE SENATOR WILLIAM COHEN, CHAIRMAN.

WHEREAS, Article IV -Powers of the Council, Section 1. (a) of the Oglala Sioux Tribal Constitution and By-Laws empowers the Oglala Sioux Tribal Council to negotiate with the Federal, State and local governments on behalf of the tribe and to advise and consult with the representatives of the Interior Department on all activities of the Department that may affect the Pine Ridge Reservation, and

WHEREAS, the Bureau of Indian Affairs within the Department of Interior is committed to accept, support and fund tribal programs contracted pursuant to Public Law 93-638, and

WHEREAS, the Oglala Sioux Tribal Council firmly endorses the concept of P.L. 93-638 and the national Indian policy "Indian Self-Determination", and

WHEREAS, Public Law 95-224 the "Federal Grant and Cooperative Agreement Act" February 3, 1978 requires changes in the Bureau of Indian Affairs regulations in carrying out P.L. 93-638 responsibilities, and

WHEREAS, the Oglala Sioux Tribal Council choses to submit the attached comment as testimony to the Senate Select Committee on Indian Affairs, oversight hearings, chaired by Senate William Cohen on the effect of P.L. 95-224 on P.L. 93-638 tribal programs, now

THEREFORE BE IT RESOLVED, the Oglala Sioux Tribe submits the attached comment as testimony to be entered in the oversight hearings record conducted by the Senate Select Committee on Indian Affairs, chaired by the Honorable Senator William Cohen on the proposed changes provided by P.L. 95-224 on P.L. 93-638 administration and funding of tribal programs.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as undersigned, Secretary of the Oglala Sioux Tribal Council, hereby certify that this resolution was adopted by a vote of: 19 for; 0 against; and 2 not voting, during a Regular Session held on the 12th day of August, 1982.

Eileen H. Iron Cloud
Secretary
Oglala Sioux Tribe

A-T-T-E-S-T:

Joe American Horse
Joe American Horse
President

BEST COPY AVAILABLE

ROCK POINT COMMUNITY SCHOOL
(via) CHINLE, AZ 86503
PHONE (602) 659-4224

October 28, 1982

Ken Smith, Assistant Secretary
for Indian Affairs
U.S. Department of the Interior
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Secretary Smith:

Enclosed please find a copy of our comments on the proposed regulation revisions to 25 CFR 271 and 276, implementing the Indian Self-Determination and Education Assistance Act of 1975, PL 93-638.

We are totally opposed to the change from a contract relationship, wherein we as the contracted school board, are fulfilling at the operational level federal responsibilities for the education of our children. We do not perceive the relationship between the Congress and Federal Government one of the "provision of assistance." By receiving grants under the proposed revisions, these regulations suggest we are "establishing a relationship" with the government. That has already been established, through treaty, law, tradition, history.

Although there are a few minor improvements in some regulations, on a whole, we believe there is a deception offered in these regulations, when no mention is made of the loss of General Services Administration (GSA) services now provided through the BIA under 41 CFR 14H-70.501 and 502. The regulations have not been offered through consultation with our people. You have not sought our opinion whether or not any changes were needed, as presently required by regulation.

We therefore request that our comment be seriously considered, and we expect to see your response to our objections. We strongly recommend that these regulations be withdrawn, and the Bureaucrats return to active consultation about how the regs could be improved so that self-determination can be actualized. We fear in accepting these regulations, we are accepting self-termination.

Respectfully submitted by,

ROCK POINT COMMUNITY SCHOOL BOARD

Kim L. Nih
Kim L. Nih, Chairman

Paul J. Jones
Paul J. Jones, Vice Chairman

Tapaha Begay
Tapaha Begay, Sec-Treasurer

Frank A. Begay
Frank W. Begay, Member

James M Begay
James M. Begay, Member

Alice P. Wilson
Alice P. Wilson, Member

Abstract of Comments on Proposed Changes in 25 CFR 271, 276

Rock Point Community School November, 1982

The Rock Point Community School Board objects vehemently to the proposed changes in the PL 93-638 grant regulations for the following reasons:

1. The changes are not required by PL 95-224. And even if they were required, the Bureau has requested waiver authority to dismiss this law. It is a Bureau initiative and not one of the Indian peoples affected.

2. No consultation, as required by present regulations, has taken place. Indians have indicated for two years there is no need to make the changes that are proposed. We have not been listened to.

3. With the loss of 41 CFR 14H-70 contracting regulations, contractors will lose the priviledge of using G.S.A. services. This will cause a significantly increase in contract operation costs for services, especially vehicles for operating day schools (in support of Bureau policy recommending day school operations.)

4. Contractors will lose the benefits and protections found under the Contracts Disputes Act of 1978, not applicable to grantees of the federal government.

5. Significant changes in the regs require additional administrative effort by contractors to meet unlimited demands of bureaucrats who have the most to lose when Bureau programs are granted away from Agency and Area offices.

6. The Bureau proposes to utilize OMB Circulars A-102 and A-87 as essential grant documents; both can be amended with Indian review and input, contrary to the provisions of the Act itself.

7. The powers and authorities of local BIA line officers is increased, without procedural protection, contrary to the repeated recommendations of the G.A.O. which has indicated that the conflict-of-interest potential within the Bureau is too strong for local Bureau officials to overcome.

8. The change to grants is a change in basic federal policy toward Indian peoples, wherein providing "assistance" through grants will "establish relationships" between the federal government and Indians. The relationship between the federal government is already established in history, laws and federal policies. We cannot accept the proposed changes that may undo hundreds of years of federal responsibility to Indians. We see the revision as a proposed "self-termination" regulation.

9. The Bureau proposes to establish specific criteria for new school starts that would make applications for operating Indian schools much more difficult. There are no proposed regulations for new law-and-order starts, new adult education starts, new community-controlled-college starts, etc. This is clearly an attempt to discourage tribes from operating schools.

10. The Bureau has been severely criticized by the G.A.O. and the Interior Inspector General on Bureau management of 638 contracts. The results appear to be: penalize those Indians for BIA mistakes and errors.

11. The Bureau has not proposed a solution to the long-running problem of indirect costs and overhead expenses for contractors/grantees. The Bureau has received policy recommendations over the past years and has failed to address one substantial indirect cost issue in these regulations. This is assumed to be intentional. We fear the solution will be imposed upon contractors without review and input, much as these regulations have been imposed.

12. The regulations as published are carefully constructed not to inform the reader of significant changes, deletions, revisions to the present regulations. No mention is made that under grants Indian organizations will lose G.S.A. motor pool services. There are no explanatory comments to indicate why any particular change is proposed. We are kept in the dark, while Central Office bureaucrats manipulate federal policy to control and dominate Indian affairs. Other agencies often will offer explanations, to clarify issues; the Bureau intends to confuse and keep matters under cover.

Rock Point Community School Comments on 25 CFR 271, 276

REF: *FR* p. 40326, Col. 1, Summary:

> The Federal Grant and Cooperative Agreement Act requires that grants or cooperative agreements be used to administer programs in which the relationship between the Federal Agency and the recipient is one of assistance.

COMMENT: The position of the Bureau and Interior that PL 95-224 requires the use of grants rather than contracts is extremely difficult to understand. PL 95-224 clearly states:

> *Notwithstanding any other provisions of law*, each executive agency authorized by law to enter into contracts, grants, or cooperative agreements or similar arrangements....(emphasis added)

There is clearly a provision of law that controls self-determination activities of Indian peoples: PL 93-638. In Sec. 102, the Secretary of the Interior is *directed* to contract with Indians for programs they wish to directly operate. Sec. 104 of the Act provides the authority of issuing grants. The Congress saw the clear separation of authorities.

In addition, the fact that the Dept. of Health and Human Services had decided *not* to amend its regulations implementing the same Act strongly suggests that the decision of Interior to make this change is *arbitrary* and capricious.

Furthermore, present regulation 25 CFR 271.3 directs the Secretary to consult with Indian tribes, national and regional Indian organizations "about the need for revision or amendment" an activity that has *not* been performed; this decision is simply a traumatic policy change by the present administration to terminate the federal responsibility to care for Indian peoples.

RECOMMENDATION: That these proposed rules be withdrawn, and the Bureau initiate dialogue, per 271.3 with Indian peoples about the need to amend the *Indian* (i.e., not BIA) Self-Determination Act.

REF: *FR* P. 40326, Summary, 1st column, Supplementary Information

> It (PL 95-224) provides that a contract be used only when the principle purpose of the relationship is the acquisition of property or services for the direct benefit or use by the Federal government.

COMMENT: The relationship between the federal government and Indian peoples is historically unique in nature, and has been viewed by the Congress as such. In fact, when the federal government contracts with a tribal organization to have performed such services the Bureau would otherwise perform, the government *is* purchasing those Indian people's services as a direct benefit to the government. It relieves the government of operational responsibility of such contracted programs. The Bureau is buying the services of a contract school board to educate, on behalf of the government. Indian children who would otherwise be served by the Bureau.

In like fashion, the use of grant instruments is warranted when the government will provide *assistance* to receiving parties. An "assistance relationship" is not the traditionally and historically perceived relationship between the Federal government and Indian nations. The conclusion to the arguments that the Bureau is assisting Indian peoples can only be that of termination, when assistance is no longer available to be provided.

RECOMMENDATION: That contracts be considered the instrument of choice when implementing the Indian Self-Determination Act.

REF: Revised Sec. 271.1(a)

> The purpose of the regulations in this part is to set forth the procedures for the application and award and administration of grants under Sec. 102 of the Indian Self-Determination Act.

COMMENT: This is a contradiction, as noted earlier. Sec. 102 of the Act clearly states in distinction with Sec. 104 of the Act, that the Bureau will contract with Indian peoples.

RECOMMENDATION: That present 271.1(a) be left intact, and the term contract be used in place of grant. The present regulation clearly distinguishes between contracts and grants, and the intent of the Act and of Congress. Cf. 271.1(b).

Rock Point Community School Comments on 25 CFR 271, 276

REF: Revised 271.1(c)(3) Nothing in these regulations shall be construed as:

(1) ***
(2) ***
(3) Permitting significant reduction in services in services to Indian peoples as a result of this Part.

COMMENT: It will be clearly shown in the following comments, as well in those comments submitted by Indians elsewhere that these revised regulations will significantly reduce services, and cause further decay between the government and Indian peoples. This proposed rule is initiating direct action to terminate federal responsibility to Indians.

RECOMMENDATION: As recommended elsewhere, these proposed rules be withdrawn and meaningful consultation between the Bureau and Indians affected by PL 93-638 be started.

REF: Revised 271.2(d) "Commissioner" means . . . .

COMMENT: We are under the impression that the position of Commissioner is no longer operative. If this is so, this term should be deleted.

REF: Revised 217.2(p) "Grant" means an instrument of award in which substantial involvement in not anticipated, establishing a relationship . . . .

217.2(q) "Cooperative Agreement" means an instrument of award establishing a relationship . . . .

COMMENT: Both of these terms as used indicated that in the issuance of the grant or cooperative agreement (CA) a relationship is established. The logical conclusion would necessarily be that where there is no grant or CA, there is no relationship! And yet, the Bureau is responsible for such services to Indian peoples as demanded by law and Congressional action. The implication appears to be that when a grant or CA once issued and later no longer exists, the relationship to Indian peoples will also evaporate. The relationship is made dependent upon the availability of a grant of CA.

Note well, however, that the definition of "contract under Revised 271.2(e) does not provide for the "establishment of a relationship." It simply states that a contract is an instrument of award. We argue that the federal is, in fact, purchasing the services of a contractor for the direct use of the government. We are performing a service that is the federal government's responsibility. Therefore, a contract is the appropriate instrument under PL 93-638.

RECOMMENDATION: that both terms be removed from the text as inappropriate in the implementation under Sec. 102 of PL 93-638.

REF: Present 271.2(k) Re-contracting, deleted

COMMENT: It is unclear to us how these regulations propose to handle multi-year grant awards. Subsequent regulation 271.22. "Continuation Grants" appears to replace "Re-contracting." But we are not provided with direction on what happens in the 2nd and 3rd years of a multi-year grant.

RECOMMENDATION: That clear directions be provided for grant continuations of a multi-year grant, and grant renewals for grants subsequent to an initial grant. R 271.22 should be re-named: ‚Grant Renewal; and a separate instruction be given called "continuation grants" for multi-year grants.

REF: Present 271.2(j) Previously private school, deleted

COMMENT: The Bureau provides no explanation for the deletion of the term "previously private school". Does the Bureau intend to eliminate the eligibility of previous private schools from participation in the Bureau's self-termination grants?

RECOMMENDATION: The term be left in the regs as presently issued.

REF: Present 271.2(d) Business related function, deleted

Present 271.2(q) Tribal government function, deleted

COMMENT: Both of these above terms are presently considered significant to have once been a part of the regulations. Their removal cannot but be seen as a means to confuse issues and ideas about what functions tribes can contract for under the Act. To remove them is to remove the eligibility of these functions from the preview of contractability under the Act.

RECOMMENDATION: That these two definitions be kept in the definitions section of the regs as is.

REF: Revised 271.3 Revision or amendment of regulations

> (a) Consult with Indian tribes and national and regional organizations to the extent practicable and consider their views in preparing the proposed revision or amendment.

COMMENT: This language deletes language presently found in this section:

> . . . about the need for revision or amendment . . .

Although this is less critical than other issues in these regs, we see no value in deleting the obligation that the Bureau should consider Indian views in whether or not the regs should be revised at all. Significant Indian input has already been offered to the BIA suggesting that these regs not be amended or revised.

Subsequent regulation 271.3(e) states that the Secretary shall annually consult with the same groups about the need to revise or amend. We know of no actions of the BIA that meet this requirement. There has been no consultation with regional tribal organizations on these issues.

The problem lies not necessarily in the regulation, but in obtaining Bureau compliance with their own regulations.

REF: Present regulation 271.4(f), deleted in the revision

> Contracting is one of several mechanisms by which Indian tribes can exercise their right to plan, conduct, and administer programs or portions thereof which the Secretary is authorized to administer for the benefit of Indians . . . . (emphasis added)

COMMENT: We understand why the term contracting could be deleted, but fail to see the deletion of the concept as underscored above. This present reg strongly indicated that the Bureau is authorized by the Congress to perform certain services. This is not assistance. This is federal responsibility. The deletion of the concept is suggestive that the Bureau intends to terminate, through grants, their moral and legal responsibilities to Indian peoples.

RECOMMENDATION: That this term be studied and considered by the Bureau as further evidence that there is federal responsibility to Indian peoples, not merely assistance to people, and that the Bureau withdraw the present draft of the grant regs.

REF: 271.4(f) New Regulation

> It is the policy of the Bureau to award funds for direct and indirect costs for grants awarded under this part.

COMMENT: It must be admired that the Bureau has a policy to award funds for indirect costs. However, the past few years have shown the Bureau to be incompetent in the estimation and administration of the Indian Contract Support Funds. This policy statement notwithstanding, it is extremely difficult, and sometimes impossible to obtain any indirect costs funds from the Bureau, forcing many schools and tribes into severe under-recovery situations, and becoming written up as incompetent fiscal managers.

The more serious objection here is that there is no further discussion in the regulations about indirect costs. Revised 271.43 is labelled "Direct and Indirect Costs," yet fails to address one point on indirect costs!

The intent is clear: the Bureau will re-publish these regs as a final rule, with the inclusion of new Bureau policies and regulations on indirect costs which will not receive the same review as this issuance of the revisions. We suspect that negatively-charged indirect cost regs will be developed and published as final, without Indian input, review, or consultation.

RECOMMENDATION: That the BIA coordinate itself with its previous reports on indirect costs (cf. American Indian Law Center's 3/82 report that recommends the elimination of the term indirect costs), and publish for comments any further recommendations or policies that it proposes to adopt for a 60 day period prior to finalization as a federal regulation.

REF: Present regulation 271.4(g), deleted

> Contracting by its very nature placed Bureau officials in the dual position of assisting Indian tribes, in many instances, by furnishing technical assistance in preparation of contract proposals and of carrying out their fiscal and administrative responsibilities as officials of the Federal Government. It is recognized that very often these two positions are in opposition to each other. . . .

COMMENT: By deleting this provision, the Bureau now must be suggesting that it will no longer feel the conflict of granting away its programs, funds, and authorities to Indians, while that conflict existed under the contracting authority of the Act. This is simply not credible.

Although it would appear that increasing the authority of local BIA administrators might suggest a better communication between grantee and the BIA, the reality of the system clearly would not provide for this benefit.

a. There is a conflict of interest in BIA employees contracting out to Indian organizations its programs, when the loss of jobs, funds, power and influence will be realized. This has been highlighted in several G.A.O. audit reports on the BIA's implementation of PL 93-638. The reader should confer the following:

-"The Indian Self Determination Act-- Many Obstacles Remain" (3/1/78)

-"Still No Progress in Implementing Controls Over Contracts and Grants With Indians" (9/10/81)

Briefly, we quote from this latter report the following:

> The situation (implementing PL 93-638) presents a dilemma or inherent conflict for BIA employees who, if they are successful in implementing self-determination, may well be eliminating their own jobs. Therefore, it is not in the BIA employees' best interest to encourage tribes to use self-determination contracts since by doing so they may be putting themselves out of a job. (9/10/81, p. 27)

We, at the local level, therefore see that in providing Agency and Area line officers with additional authority to decline grants, and to use the ambiguities in regulatory language as noted above at their discretion, tribal organizations will undoubtedly continue to suffer from the Bureau's reluctance to "cut itself off." The G.A.O. had recommended that a separate office be established to assist tribes in taking over Bureau programs, because Bureau officials had continued to do such a poor job in contracting itself out in the first place.

b. The Bureau is presently not staffed or trained to handle the committements' and responsibilities demanded by PL 93-638 and its regulations under the present system. This is not only reflected in the experience of many Indian contractors, as testimony to this committee has indicated, but also in the G.A.O. reports listed above, and additionally in the Bureau's "Indirect Cost Report" prepared by the American Indian Law Center (May, 1981). There were at least nine specific recommendations in that report that the BIA get itself trained to provide accurate information, technical assistance, and to clarify the mess that has developed over indirect costs (see the second part of this testimony, following.) Even though the present regs have been operative for more than six years, the Bureau has not developed the expertise to do the job right. Many tribal organizations are reluctant to request BIA technical assistance, because of the ineptness, inadequacy, and erroneous advice that comes from BIA field and central office staff. It is amusing, and at the same time discouraging to read of the BIA's pride in now offering pre-application TA under these proposed grant regs, when their performance has been so inadequate in the past.

Should the BIA be allowed to implement these grant regulations, we predict the BIA will proliferate its personnel and resources to meet these additional administrative needs within itself, absorbing funds earmarked for Indians, rather than making them available for additional contract support funding or for implementing new Indian programs.

In its introductory remarks, (cf. FR 9/13/82, p. 40326), the Bureau fully acknowledges that it is increasing the authorities of the Area and Agency officials, ". . . to permit more decision-making at field offices. . ." than presently exists. This is completely contrary to the G.A.O. reports which indicates that there has been too much abuse of discretion at the field office level.

RECOMMENTION: That the authorities and responsibilities of field office personnel of the Bureau be reduced and not increased, and that the present language be amended to change only the word contracting to granting, as follows:

> Granting by its very nature places Bureau officials in the dual position . . . .

REF: Present regulation 271.4(h), Eligibility Criteria deleted

COMMENT: We are provided no guidance why this regulation was not amended, rather than being deleted. In so deleting, the Bureau weakens the available guidance regarding what programs can be awarded grants. Combined with the deletions of present regulations 271.2(d), (j), and (q), we interpret that the Bureau is intending to reduce initiatives of Indian peoples to fulfill the intent of PL 93-638. With all the "talk" by Bureau staff about encouraging self-determination, we see little evidence in the regs changes that supports that talk.

REF: Revised 271.4(h)

In any conflict between the Act and these or other regulations, the Act shall prevail.

COMMENT: A wise regulation. We wonder why it is not heeded in this very set of revisions. The whole notion of receiving grants and assistance to Indian peoples is contrary to the letter and spirit of the Act! The Act directs the Secretary to contract and grant Bureau programs. These revisions change the intent of Congress.

RECOMMENDATION: That the Bureau follow this good policy statement and with draw this present set of regulations, and amend the existing regulations upon consultation with affected Indian peoples.

REF: Revised 271.4(1)

> The Commissioner may waive any provisions of grant laws or regulations which he determines are not appropriate for the purpose of the grant involved or are inconsistent with the provisions of the Act.

COMMENT: We are unaware of any regulatory authority in any other agency that provides to an agency staff officer unilateral authority to waive Congressional laws and regulations under such other agencies. We are shocked that the Bureau could propose such wide-ranging powers. Present authority to waive regulations is found in Present 271.51, and applied only to federal contracting laws and regulations, as specified in 41 CFR 14H-70.

There is no guarantee provided that any waivers exercised by the Commissioner would be made for the benefit of the Indian organizations affected. This proposed authority could be invoked by a Bureau official to trim back procedural protection presently found in the rules, and make available unlimited discretionary authority to impose any rule on a grantee whatsoever. All of OMB C. A-102 could be waived, and separate instructions could be mandated on grantees, with the possibility of no recourse. Could not the hearing and appeals regulations be waived if the Commissioner felt that this would not be supportive of the Bureau's need to control Indian programs?

Furthermore, we see a conscious effort of the authors of these regulations to intentionally deceive and mislead the Indian constituency which is affected by these changes. If, in fact, the Bureau is requesting unlimited waiver authority to waive laws and regulations that do not serve the purposes of the Act, we demand to know why PL 95-224 has not been waived already! The Bureau has argued in the regulations, and to the Congress that "we have to make this change." PL 95-224 "requires" that we change to grants. Yet with the waiver authority requested, 95-224 could also be easily dismissed as not fulfilling the purpose of the Act. But this has not been done.

RECOMMENDATION: That the following language be substituted for the above revision:

> The Commissioner may waive any provision of these regulations upon the request of an Indian grantee or applicant which are considered by the Commissioner and applicant/grantee not appropriate to self-determination initiatives or are inconsistent with the provisions of the Act.

REF: Revised 271.12(a)(4) Operation of or services provided by previously private schools. Additional criteria for grantable new school starts and program expansions are given in S 271.71 through 271.75.

COMMENT: We saw earlier that the definition of a previously private school was eliminated in this draft of proposed changes. With the inclusion here, we remain confused why previously private schools are no longer defined in 271.2.

The reference to the new school starts and program expansions should be deleted here. Cf. later comments on these regulations. These regulations should not be made a part of the granting authority regulations but should be entered into the revision of 25 CFR 31h regulations regarding education. Nevertheless, it is not essential that the "lead time" required in the Revised 271.71 - .75 are really required at all. For example, the Bureau maintains a separate pot of money to pay for the repair and maintenance costs for new BIA schools and buildings that have not been made a part of the annual budget appropriation cycle. In the Navajo Area, several new BIA-operated school buildings/institutional buildings received separate M & O funding from funds allocated specifically for buildings not a part of the cycle. The Bureau could, therefore, program a separate fund to account for the costs of new schools not previously part of the budget cycle; funds unused at year's end could be returned to the Treasury, or carried forward and offset against the subsequent year's budget needs. Although this suggestions in more appropriately a comment on R 271.71, we add it here for emphasis.

REF: Revised 271.12(a) Tribal organizations are entitled to receive grants from the Bureau to plan, conduct, redesign and administer all or parts of any program. . . .

COMMENT: We commend the Bureau for adding the term redesign to this regulation, without adding provisos for the need for waivers on the part of the Bureau for an Indian organization to redesign a formerly Bureau program.

REF: Revised 271.12(a)(5)

Alteration and repair of Bureau property in direct support of a granted program. Individual construction and design projects are not grantable under TITLE I of the Act.

COMMENT: This revision adds the word Bureau before property, indicating that alteration and repair grants will not be made available to previously private schools, although the intent of Congress has consistently been that previously private schools serving Indian children are eligible for Facilities M&O funding under 638 contracts.

Secondly, present regs indicate that construction projects, although not available under TITLE I can be contracted for under other authorities. This is deleted here, suggesting no other authority provides for this act of self-determination.

Thirdly, design projects is added, changing the intent of the previous regulation 271.12(a)(6), whereby now not allowing design projects as a contractable activity.

This change is not justified or explained by the BIA. The absence of any explanation suggests that the BIA will not tell us why and what good reason it has to make such changes. It further reduces the self-determination prerogatives of the Indians served by PL 93-638.

RECOMMENDATION: That no revision of this regulation be made, and the present regulation remain intact.

REF: Present 271.13 Application information, Deleted

> Application instructions and related materials may be obtained from Superintendents, Area Directors, and the Commissioner.

COMMENT: This has been removed. We ask: Why? There is no provision in the revision to suggest where tribal organizations may go to gain the initial packages of materials for preparing either a section 102 grant request/application or a section 104 grant application. It cannot be assumed that all offices previously indicated in the present regulation will have such materials. The Bureau could narrowly provide such information only through the office of the "638 Coordinator" or some other restriction.

RECOMMENDATION: That this regulation be placed once again in the revision, at the same spot.

REF: Revised 271.13 Pre-application technical assistance

(a) The Bureau will provide technical assistance to a prospective grant applicant to assist it in the preparation of the formal application. A written notice of intent to apply for a grant and request for technical assistance must be submitted at least 45 days before the anticipted date of submission of the formal, completed application in accordance with 271.16. Technical assistance shall include but not be limited to the following:

(1) Determining the appropriateness and feasibility of a grant.
(2) ***
(3) ***
(4) ***

(b) The Bureau shall seek to make technical assistance available to tribes and tribal organizations from any available resource to the extent that funds and manpower are available.

COMMENT:

a. With this revision, the Bureau places a timeline of notification of intent to apply for a grant and formal request for assistance in writing. If the Bureau wishes to be so careful as to implement a timeline and require official notification in writing and requests in writing, then there should also be added timeline requirements that the Bureau will respond in writing to the request with a timeline or response with an offering of technical assistance.

If has been too often the experience of Indian peoples that requests for TA, simply go unheeded. We know that in many area offices, the capability to provide TA is weak. However, this revision should also provide for a timely Bureau response.

b. In addition, there is something left out of the revisions that should have an explanation provided. The Bureau deletes the prior offer in (b) to find and assist in finding technical assistance from other Federal agencies.

c. Thirdly, it is unclear as written whether or not this regulation requires an applicant for TA. "The Bureau will provide technical assistance to a prospective grant applicant to assist it in the preparation of the formal application." As written, the reg does not indicate that it is an option for an applicant to request. It would appear that TA is a requirement, similar to a pre-application proposal.

Furthermore, the following sentence states, in part: "A written notice . . . must be submitted . . . at least 45 days before the anticipated date of submission" of the proposal. This appears to require pre-application TA as a matter of regulatory procedure.

This may not be the intent of the regulation, but if not so, it should be revised.

RECOMMENDATION: That the regulation reas as follows:

> (a) Technical assistance to a prospective applicant is available, upon request. An applicant wishing technical assistance must submit the appropriate request to the Bureau official who would otherwise receive a proposal for a grant at least 45 days before the anticipated date of submission of the formal, completed proposal. Technical assistance may include, but not be limited to the following:
>
> (1) Determine the appropriateness of a grant;
>
> (2) ***
>
> (3) ***
>
> (4) ***
>
> (b) ~~The-Bureau-shall-seek-to-make-technical-assistance available-to-tribes-and-tribal-organizations-from-an-available resources-to-the-extent-that-funds-and-manpower-are-available.~~ Upon request of a tribe or tribal organization, the Bureau will also assist in obtaining technical assistance from other Federal agencies.

REF: Present 271.14 Contents of Contract Application, removed

COMMENT: This regulation has been removed, and nothing really comparable has been added to replace it. Revised 271.16, "Preparation of initial Grant Application" does not address the specific details that the present 271.14 does. In addition, critical language in present 271.14 is deleted in the removal process. This matter will be addressed in comments on revised 271.16.

RECOMMENDATION: That present 271.14 be left in the regulation, and revised 216 not be adopted (see later comments on 271.16).

REF: Revised 271.14 Access to Bureau Records

(a) ***

(1) ***
(2) ***
(3) ***
(4) Data on the amount of funds which have been provided for the direct operation of the specific program(s) or portions thereof by the Bureau during the past fiscal year and proposed grant period;

(b) (1), (2), (3), ***

(c) ***

COMMENT: To clearly indicate that all Bureau fiscal data is available to an applicant, the following addition is recommended:

RECOMMENDATION:

(4) Data on the amount of funds which have been provided for the direct operation of the specific program(s) or portions thereof by the Bureau during the past fiscal year and proposed grant period;

(a) Fiscal information includes Bureau program fund levels, administrative cost levels, and the disposition of the Indian Contract Support Fund.

REF: Revised 271.15 Tribal resolutions

COMMENT: Although we find no major objections to the revision as prepared and presented, we strongly object to what is deleted from the present regulation.

Present 271.18, Tribal request for initial contract, offers in para. (c) the flexibility of a tribe to use the procedures for drafting tribal authorizations according to a tribe's own internal procedures. This reg reads, in part:

> (a) Any procedure given in this section concerning the manner in which a tribal governing body passes a tribal resolution shall apply except where inconsistent with the tribe's organic documents or in the absence of such organic documents the tribal practice.

We believe that this is a good regulation. Should a particular tribe not use the procedural process of passing resolutions, and uses in its place the writing of a letter, or the passing of an authorizing approval not in standard resolution form, that procedure is acceptable. The revision disallows this option, and could be used as a Bureau manipulative procedure to control the internal procedures of a tribe: you must use the resolution format, or we will not accept your tribal wishes!

RECOMMENDATION: that para. present reg 271.18(d) be added and made (c) in revised 271.15.

REF: Revised 271.16 Preparation of Initial Grant Applications

(a) * * *

(b) * * *

(c) Application for an initial grant under this part shall be prepared in accordance with 276.16.

(d) Part IV of the application form, SF-424 Federal Assistance, shall list Bureau equipment, facilities, and buildings needed to carry out the grant. Bureau programs or portions of programs which the tribal organization wishes to operate shall be described and a plan shall be included for operating the program(s). The plan shall describe the services to be provided under the grant and the organization, methods and procedures to be used to accomplish delivery of services. It shall include but not be limited to:

(1) A description of the personnel system and position descriptions for key personnel.

(2) A staffing plan, including extent, if any, that Bureau personnel may be utilized. (See Part 275 of this chapter for staffing options the applicant may wish to consider.)

(3) The evaluation criteria and control systems that the tribal organization will use to measure progress and accomplishment and to assure that the quality and quantity of actual performance conforms to the requirements of the plans.

(e) A copy of the tribal organization's travel policy shall be submitted for evaluation as described in § 276.17.

COMMENT: As indicated earlier, this section does not adequately address the contents of an application as does the present 271.14. Several significant issues arise here, indicating the loss of protection from overy-bearing Bureau-crats who could use the revised regulation to possibly deny a grant application.

1. We are referenced to use the requirements of 276.16 to guide the application process. The substance of this requirement is to use ATTACHMENT M of OMB C. A-102.

This is a document prepared for use with all federal agencies for routine grants management. As such, it is a document that delineates requirements for all, Indian or non-. Therefore, it does not address any particular issue or concern reflective of the First Americans. Additionally, it is a management document, which can be changed administratively, without public in-put. This alone violates the past principles and practices that dictate that the procedures under PL 93-638 will be published for public review and will reflect Indian concerns. This loss of Indian input is a significant change, as the Bureau iw well aware of. (Comments have been submitted to the Bureau over the past year strongly objecting to the use of A-102 on these grounds, and the Bureau is well aware of this deliberate change in the liberating procedures outlined in the Act.)

2. Section (d) states that Part IV of the application found in ATT. M shall list buildings and property, and generally provide for the narrative of a grant application.

As stated in section (c), 276.16, the SHORT FORM of ATT. M will be used. Upon checking PART IV o f ATT. M-5 (Short Form), we find Part IV to read: ASSURANCES.

We assume the Bureau meant PART III of the short form. PART III states:

> The program narrative should be brief, preferably one or two paragraphs, which shows the need, objectives, approach, geographical location of the project and the benefits expected to be obtained from the assistance.

It seems improbable that "one or two" paragraphs could suffice for the amount of information that the BIA wants to have! It seems absured to require the use of the SHORT FORM when large amounts of information is required, and when additional mounds of information can be asked in addition to what is required.

3. In the NARRATIVE requirements under both the short form (M-5) and the long non-construction form (M-3), we find objectionable requests for information.

No tribal grantee need explain and justify a need for a grant. It is a right established by Congress, moreover, a mandate for Indian peoples to take over the operational responsibility of Federal obligations. Again, A-102 is not appropriate.

No Indian grantee need explain the principal and subordinate objectives of the project. Indian schools need not operate on standard white abstractions. Schools have philosophies, and goals and objectives for students and community development. We should not be required to establish goals for the grant itself! The goals for a grant are stated clearly in the Act. Section 3(c) of the Act as a goal that "[it] is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excell in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." This is the goal of a grant!

No grant applicant need send in supporting documentation or other testimony in support of a grant request. The Bureau fails to comprehend on the operational that it is law to contract/grant with Indians, and no testimonials are required.

No Indian school need cite factors that will accelerate or decelerate the work of educating Indian children!

The point: present regulations identify what is required for a contract under the Act, not vague and unspecified requirements as under A-102. A-102 is not appropriate.

4. In addition, para. (d) states, just prior to sub-section (1):

> The plan [for operating the program] shall describe services to be provided.... [I]t shall include, but not be limited to:

Although a short phrase, there are severe consequences for applicants for grants that applicants for contracts have not needed to face-- a potentially endless request for application information, at the discretion of local officials. The present regulation clearly states the limits of bureaucratic requests:

> Application for a contract under this Part shall contain the following information in sufficient detail to permit evaluation of the application in light of the declination criteria set forth in § 271.15. No further detail is, or shall be, required.

This is a clear loss of protection from endless requests for a "complete" application, which is a declination issue. The revision eliminates the mandate to relate the evaluation of an application to declination issues. This guidance is lost.

5. Also lost is the availability of "getting established" under a grant that is present for contracts. Present 271.14(m) states that a contract applicant may "submit a written agreement to establish a bookkeeping and accounting system that meets the standards of § 276.7." Para. (n) allows for an applicant "to establish within 90 days of contract execution a satisfactory system for managing property and keeping records." Para. (q) states that if an applicant does not have procedures to safeguard Indian rights, "but agrees to establish them," it will meet the demands of a contract application.

The revision eliminates all of these "flexible" requirements that would allow for new contractors/grantees to use the contract itself as a means of establishing its identity and actually attempt self-actualization, or self-determination. The revision clearly discourages this by insisting that these systems be in place prior to the receipt of a grant.

Many of us feel the Bureau should meet these standards set for contractors!!

RECOMMENDATION: That this section be revised as follows:

271.16 (a) * * *

(b) * * *

(c) deleted

(d) deleted

(e) deleted, added to the following

A new 271.17 be added: S 271.17 Contents of a grant application

(a) through (r) of present 271.14 Contents of an application, with appropriate change of contract to grant;

new (s) The travel plan requirement of Revised 271.16(e), as noted above.

REF: Revised 271.18 Notification of Recipt

(a) Within five days . . . . [U]ncomplete applications will not be accepted for processing.

COMMENT: Here lies a new declination criteria, not found in the para. entitled declination criteria. Someone, such as an Education Line Officer, must decide to accept or decline to accept an application. The term "complete" is not defined according to any standard, and considering the vast amount of discretionary prerogatives available to Bureau officials, contrary to Indian wishes and G.A.O. audit report (see above), virtually any application could be refused as incomplete. In fact, an application that is refused at this time may actually make the applicant a part of the procedural system altogether. There would be no recourse to hearings and appeals, as, in fact, the applicant may not even be considered an applicant, since the application was never accepted in the first place.

RECOMMENDATION: This last sentence should be deleted, and addressed, if at all as a declination criteria (as is also done).

REF: Revised 271.19 Initial review and action

(a) ***

(b) ***

(c) If within fifteen (15) days the Area Director cannot approve the application, he/she must decline the application and so notify the tribe. The notice shall be in writing and shall contain:

(1) Identification of the specific reasons that the grant cannot be entered into.

(2) Specific recommendations on actions required by the applicant to overcome the deficiencies and a description of the nature, scope and source of the technical assistance which will be available to overcome the deficiencies.

COMMENT: As indicated by the Bureau in its opening remarks (FR, p. 40326), the Area Directors are given the power and authority to deny and reject grant applications. As also noted earlier, this is in direct conflict to repeated objections by Indians and by the G.A.O. in its evaluation of the Bureau's implementation of PL 93-638.

RECOMMENDATION: That Area Directors retain only the present authority to recommend declination to Washington, so that a fairer review can be made by Bureau officials not so close at hand to the Indians desiring to control their own destinies.

REF: Revised 271.20 Criteria for declining a grant

> (a) A grant may not be declined because of an objection that could be overcome through the grant. The Area Director may decline to award a grant only for the specific causes given in paragraph (b) of this section. The Area Director shall demonstrate, through substantial evidence, that one of the specific grounds for declination exists and that, therefore, the application must be declined.

COMMENT: Beyond the objection of the Area Director having the authority to decline an applicant, the revised language waters down present language, which states, in present 271.15(a), "The burden of proof is on the [Commissioner] ...."

Not a small point! The English word "proof" is defined by Merriam-Webster's New Collegiate Dictionary as "the cogency of evidence that compels acceptance by the mind of a truth or a fact."

Recommendation: That the original language of the present regulations be kept intact, as follows:

> (a) A grant may not be declined because of an objection that could be overcome through the grant. ~~The Area Director may decline to award a grant only for the specific causes given in paragraph (b) of this section. The Area Director shall demonstrate, through substantial evidence, that one of the specific grounds for declination exists and that, therefore, the application must be declined.~~ "The burden of proof is on the Area Director to demonstrate through substantial evidence that one of the specific grounds for declination exists and that, therefore, the application must be declined."

REF: Revised 271.20(b)(2)(i)

> (i) It will be presumed by the Bureau that the program plan and budget set forth by the tribal organization provides a basis for the delivery of satisfactory services to the Indian people unless it can be demonstrated by the Bureau that the program will yield results which may be harmful to the welfare of the Indian people to be served.

COMMENT: There are two significant changes here:

1. The phrase "with substantial evidence" has been deleted in the Bureau's requirement to show that Indians will be harmed by the proposed grant program.

2. In the present regulations, the Bureau must show, with substantial evidence, that "the program will yield results which will be deleterious" to Indians. [cf. present 271.15(b)(1)(i)]. The new language reads: "the program will yield results that may be harmful" to Indians. Talented bureaucrats that have more time than applicants have to demonstrate such issues could prove to be another roadblock to self-determination.

RECOMMENDATION: That the language of the present regs be left intact.

> (i) It will be presumed by the Bureau that the program plan and budget set forth by the tribal organization provides a basis for the delivery of satisfactory services to the Indian people unless it can be demonstrated by the Bureau by substantial evidence that the program will yield results which will be deleterious to the welfare of the Indian people to be served.

REF: Revised 271.20(b)(2)(ii)

> The service to be provided shall be deemed satisfactory if the applicant has established procedures. . . .

COMMENT: Present regs allow for flexibility, and for fulfillment of the point of this regulation during and through the contract itself.

RECOMMENDATION: That the present regulation, 271.15(b)(ii) be left intact.

> The service to be provided shall be deemed satisfactory if the contract application indicates that the grant applicant has or will establish procedures. . . .

REF: Revised 271.20(b)(2)(6)

The additional requirements for new school starts and program expansions in Subpart G have not been met.

COMMENT: This regulation, as well as all of Subpart G, does not belong in the guiding general regulations for self-determination. These should be published as a part of revision to 25 CFR 31h.

RECOMMENDATION: Delete this regulation, and make it a part of 31h.

REF: Revised 271.20(c)(5)(i) / (ii) / (iii)

> (i) The tribal organization has a personnel system that prescribes minimum occupational qualification standards which insure equal access to all qualified tribal members;
>
> (ii) The tribal organization has procedures for the selection of personnel on the basis of such standards; and
>
> (iii) The personnel to be used under the proposed grant are to be employed under the personnel system.

COMMENT: Again, a major difference between this revision and its parallel in present 271.15(c)(5)(i) / (ii) is the inflexibility for a grantee to use the grant as a vehicle to meet the demands of good personnel management. Para. 271.15(c)(5)(ii) states:

> (ii) If there is no tribal personnel system, it will be assumed that the personnel to be employed under the proposed contract are adequately trained if the tribal organization has established position descriptions for key personnel to be employed under the contract and agrees to establish a personnel system similar to the one described in paragraph (c)(5)(i) of this section.

This allows for the establishment of a system that meets the requirements, instead of requiring that it all be in place on the opening day of the program.

Contract program funds are limited enough, making it a tight squeeze to provide adequate program services. The Bureau's establishment of the Indian Contract Support Fund, and it subsequent mis-management, with no provision for the administrative costs similar to the Bureau's administrative costs, makes it virtually impossible for a contractor/grantee to provide for highly paid personnel officers, Job-Description writers, etc., as the BIA can afford. The BIA can afford to provide for staff positions whose only job is to write a position description, and evaluate a wage/grade level, etc. Contractors are more busy at providing services.

RECOMMENDATION: That para. 271.15(c)(5)(ii) as quoted above, be reinstated as a provision of this regulation on personnel.

REF: Revised 271.20(c)(6)(i)

> (i) Does not have an adequate personnel system that provides selection standards which insure equal access to all qualified tribal members;

COMMENT: As noted in the previous revisions and comments, there is no room for growth and development in these regs. The comparable present reg reads as follows, at present 271.15(c)(6)(i)(A):

> (A) Does not agree to develop an adequate personnel system that provides selection standards which insure equal access to all qualified tribal members;

The key notion here is: "DOES NOT AGREE TO DEVELOP AN ADEQUATE PERSONNEL SYSTEM...." The assumption throughout these revisions are that a tribal organization must be already established (without the assistance of start-up grant funds, or course) prior to dealing with the government. If such were so, no need should exist for contracting with the Bureau!

RECOMMENDATION:

That present reg 271.15(c)(6)(i)(A), as quoted above, remain as is and the proposed revision not be adopted.

REF: Revised reg 271.20(c)(6)(ii)

> (ii) Does not have management systems that meet the standards of Part 276 of this chapter.

COMMENT: Again, the Bureau has determined to make it as difficult as possible for a tribal organization to exercise its rights under law: it must have in place management systems that meet certain reasonable requirements. The present reg, found at 271.15(c)(6)(i)(B) reads:

> (B) Has not agreed to establish and maintain a property management system which will adequately account for and protect government property.

The changes in these regs believe the distrust of Indians that the Bureau has, even though the Bureau is staffed by Indians, and should be speaking on behalf of its clientele.

RECOMMENTATION: That the present reg 271.15(c)(6)(i)(B) be left intact, and no change be adopted.

REF: Revised 271.20(c)(6)(iv)

(iv) Has not submitted a completed grant application.

COMMENT: This regulation is found precisely as written in the present regulation at 271.15(c)(6)(D)-- except that the revision deletes the following extremely important limitation on the Bureau's discretion to require endless information in an application, which, if never met by the applicant, would result in a declined contract/grant.

(D) Has not submitted a completed contract application.

(ii) All "other necessary components" have been specifically identified in this section. No other components shall be defined which may serve as a basis for declination unless they are added to these regulations by revision or amendment of the regulations.

The components for declination identified. Nothing else can be used, or added to the review process, unless found in regs, passed through publication and review by Indians. This deletion is a very serious fault in the revision. It does not appear to be accidental, when viewed with all other changes. When this deletion is reviewed with the present 271.14 language that has been deleted, it is clearly a move by the BIA to obstruct self-determination. That language states:

> Application for a contract under this Part shall contain the following information in sufficient detail to permit evaluation of the application in light of the declination criteria set forth in 271.15. No further detail is, or shall be, required. (emphasis added)

The effort made by BIA officials is coordinated: eliminated the Bureau's self-imposed restrictions, and increase the restrictions that can be imposed by local BIA officials, who can now decline to grant programs to Indians, whose self-determination attempts would reduce BIA's powers and authorities. We view this as a substantial example of BIA-Determination!

RECOMMENDATION:

Under para. 271.20(c)(6)(iv), add this paragraph, as in the present regulation:

> 271.20(d) All "other necessary components" have been specifically identified in this section. No other components shall be defined which may serve as a basis for declination unless they are added to these regulations by revision or amendment of the regulations.

REF: Revised 271.20(c)(2)

> It must be demonstrated by the Bureau that the tribal organization which will undertake the grant does not have an adequate accounting and bookkeeping capability.

COMMENT: The Bureau deletes terms that are supportive and encouraging to tribal organizations to attempt to do it themselves. The Bureau proposes to delete "clearly" in demonstrating its objections to a fiscal system; and the deletion of the phrase". . . [o]r cannot have in place, using contract funds, an . . ." is discouraging to small Indian organizations that wish to start up their own self-determination efforts. In so deleting this phrase, the Bureau suggests a clear contradiction to the stated policy in revised 271.20(a) above, which states "A grant may not be declined because of an objection that could be overcome through the grant."

RECOMMENDATION: That the Bureau leave the phrasing and terminology of the present regulation 271.15(c)(2) as is:

> (2) Bookkeeping and accounting procedures. It must be clearly demonstrated by the Bureau that the tribal organization which will undertake the contract does not have or cannot set in place, using the contract funds, an accounting and bookkeeping system which will be adequate.

REF: Revised 271.21 Approval and award

> (a) Within sixty (60) days after receiving a formal application the Bureau will approve the application and award a grant (subject to availability and amount of funds if the award occurs in advance of the allotment) so that the performance period coincides with the beginning of the Fiscal Year or the beginning date indicated in the application, whichever is later, unless the applicant is notified before that time that the application has been declined.

COMMENT: The intent of this revision is clear: grant awards must coincide conveniently with the start of a federal fiscal year. Therefore, a community applying for a BIA program operated on a school year basis may have to wait an additional year to assume a program, since the starting of a school year program in October would provide undue disruption to the education of students. The Bureau is well aware of the importance of starting school (cf. New School Starts). An applicant wishing to start a grant in August would be required to wait at least until October 1 to start, and most likely be required to wait until the following August, in order to effect an orderly transition.

The problem is with the instruction "whichever is later." A grant for school operations should start with the school (or better, after the end of the previous school year).

RECOMMENDATION:

> (a) Within sixty (60) days after receiving a formal application the Bureau will approve the application and award a grant (subject to availability and amount of funds if the award occurs in advance of the allotment) so that the performance period coincides with the beginning of the Fiscal Year or the beginning date indicated in the application, ~~whichever is later,~~ unless the applicant is notified before that time that the application has been declined.

REF: 271.22 Continuation Grants

(a) Continuation grant applications will be prepared using the standard application form, Standard Form 424, Federal Assistance, and will contain:

(1) Evidence of authority to continue, and

(2) An explicity description of any proposed program changes, including a revised budget.

COMMENT: In conjunction with a prior recommendation, the Bureau should not utilize A-102, and request a simple listing of required information.

As noted previously, "continuation grants" is an unclear term. It is intended to mean the renewal of grants after the initial term of a grant. It is unclear if a "continuation grant" as so named qualifies for same time frames as noted under 271.17.

RECOMMENDATION: That this section be called: Grant Renewal, so that it is clear that the section does not refer to the 2nd and 3rd years of a multi-year grant.

REF: Revised 271.23 Cooperative agreements

> (a) Under specified circumstances the Commissioner may prescribe the award of a cooperative agreement rather than a grant. In such cases, the application, review and award processes shall be exactly the same as those described for grants in this Part. However, a cooperative agreement award shall contain special terms and conditions consistent with the anticipated substantial involvement by the Bureau.

COMMENT: Present regulations are specific and detailed enough, with caps and limits defined, that Indian organizations can feel reasonably assured of what is required to meet performance. This revision allows for "under specified circumstances" that are not specified! Some unknown and vague reasons can be used by a local Bureau official to continue Bureau presence in a tribal organization's affairs. While the imposition of such requirements is subject to the appeal rights, we forsee "special conditions" being individual Bureaucrat's personal decisions about what he is likely not to support. Whereas the present regs seek to limit this kind of influence, the revision appears to increase it.

It is unclear what the appeal wights are under cooperative agreements. We are not informed what the procedures are if an applicant requests a grant, and receives in return a cooperative agreement. With the broad waiver authority requested in the proposed revisions, such appeal may even be waived if in the Commissioner feelings and opinion, it should be.

RECOMMENDATION: This regulation be deleted, and the Bureau return to contract under Section 102 of the Act.

REF: Revised 271.23(b)

> (b) The Commissioner may order the use of a cooperative agreement when, in his judgement, performance would be improved by the use of a cooperative agreement and when any of the following conditions exists:
>
> (1) Substantial Bureau involvement is required to protect Trust resources,
>
> (2) Technical assistance requested by the tribe can best be provided through continued substantial involvement of Bureau personnel,
>
> (3) The applicant's management systems as implemented do not meet the standards of Part 276 of this chapter, but performance under the grant is not so deficient as to be cause for reassumption.

COMMENT: The Commissioner is given the same authority as the local BIA staff person is given, when "in his judgment" performance would be improved. We are provided no criteria for guidance on what constitutes good judgement. One would also have to look at the G.A.O. audits of the past few years to realize that there is considerable doubt about the Bureau's own ability to manage programs, and we cannot assume that the provision of services is of that high a standard of quality to start with. Cf. the following lists of audit reports:

Concerted Effort Needed to Improve Indian Education (1-1-77)

The Bureau of Indian Affairs Should Do More To Help Educate Indian Students (11-3-77)

Questionable Need For All Schools Planned By the Bureau of Indian Affairs (2-15-78)

Bureau of Indian Affairs Not Operating Boarding Schools Efficiently (2-15-78)

More Effective Controls Over Bureau of Indian Affairs Administrative Costs Are Needed (2-15-78)

The Indian Self-Determination Act -- Many Obstacles Remain (3-1-78)

RECOMMENDATION: That this regulation be deleted as revised; no substitute.

REF: Revised 271.26 Grant revision or amendment

COMMENT: The bureau proposes to use the same procedures for a grant application review process for grant amendments. At the same time, Rev. 276.14 refers the grantee to A-102 for grant revision and amendment procedures. In Attachment K, we find the Bureau imposing restrictions on the amounts of funds that can be transfered without BIA approval, i.e. up to 5% of the grant. Education programs funded under the 25 CFR 21h formula distribution should not be restricted by Bureau oversight and approval. Such funds are provided to the Bureau-operated school board under the authority of the local BIA board's control. BIA schools are not required to live by this restriction. Contract schools should not be given additional burdens BIA schools don't have.

It would also appear that the Bureau could unilaterally amend or revise grant provisions, without the consent of a grantee. As this is not strictly addressed, its absence may be construed as sufficient authority to allow unilateral changes by a grants officer.

RECOMMENDATION: That A-102 be deleted from the regulation, and this regulation be revised without ref. to A-102.

REF: Revised 271.41 Uniform administrative requirements and cost principles

> (a) The provision of Part 276 of this chapter that establishes uniform administrative requirements and cost principles shall apply to grants under this part. Special grant conditions more restrictive than those required by Part 276 may be imposed only when the Bureau determines that a grantee:
>
> (1) Has repeatedly violated established grant performance requirements, or

COMMENT: This regulation appears to give the Bureau unlimited powers to unilaterally add requirements to a grant without the consent of the grantee. This appears to us to be an indication that the present contractual relationship between a tribal organization and the U.S. Government is being watered down to some superior-inferior relationship between a patronistic grandfather and an irresponsible child.

No special grant conditions should be able to be imposed upon a grantee without full consent of the grantee. If conditions exist that warrant Bureau control beyond what is normally deemed necessary, then the Bureau has declination or termination for cause procedures (except that in the revision, termination for cause has been eliminated.) The Bureau must be forced to demonstrate, with substantial evidence, the need for these requirements.

This paragraph of the regulations reflects a presumption that the Bureau itself is that much better at managing programs, finances, etc. than Indians are. We are very aware of the Bureau's gross mis-management of funds and programs over the years. We ask: can the Bureau have imposed upon them special grant conditions that will require them to:

1. Issue contracts/grants in a timely manner, by Oct. 1 of the fiscal year for a grant?

2. Issue contract mods in a timely manner?

3. Provide funding for all program elements in a timely manner?

4. Process invoices in a timely manner?

5. Comply with all federal rules and regulations for financial management and administrative responsibilities?

We could accept the proposed language if comparable language was added to require special conditions on the Bureau.

RECOMMENDATION: That this paragraph be deleted as written. Alternatively, the following language could be added as paragraph (c)

> Special grant requirements may be imposed on the Bureau by a grantee when a grantee can demonstrate with substantial evidence that the Bureau has failed to meet federal regulations and procedures required for proper grant management.

REF: Revised 271.42 Savings

> (a) If it becomes apparent during the grant period that the amount of a grant under this part will be in excess of actual expenditures, the identified savings may be used to provide additional services or benefits under the grant and/or expand base grant programs.

COMMENT: We have no major objection to this restatement of present 271.55, excepting that as in the past, it is extremely difficult to identify precise amount of savings in a contract/grant prior to final closeout of the accounts of that fiscal year. Final payments for some invoices and costs may not be paid for up to 90 days past the ending date of the contract/grant.

RECOMMENDATION: That the term "identified" be deleted and "estimated" replace it.

> (a) If it becomes apparent during the grant period that the amount of a grant under this part will be in excess of actual expenditures, the ~~identified~~ estimated savings may be used to provide additional services or benefits under the grant and/or expand base grant programs.

REF: Revised 271.42(b)

> (b) When both the tribal organization and the Bureau agree that it is not practicable to spend the savings during the grant period and the grant funds were appropriated pursuant to the Act of November 2, 1921 (42 State. 208), the savings may be carried over into the succeeding fiscal year grant period, except as otherwise specifically provided in appropriation acts. Savings carried over into a succeeding fiscal year shall be added to the grant amount for the fiscal year. The savings shall not reduce the amount that would have been made available if there had been no savings. Funds available through savings shall be used before a tribe uses grant funds from the current fiscal year.

COMMENT:

1. The author of the revision specifically changed the term "the savings shall be carried over" [cf. present 271.55(b)] to "the savings may be carried over" to the subsequent year. We question this change. The terms "shall" and "may" when used in the legal contexts as herein used have recognized specific meanings. The former reg instructs the Bureau to carry funds over; the revision gives the Bureau some discretion whether or not to carry funds forward.

RECOMMENDATION: That "will" be deleted and "shall" be used in its place

2. We commend the Bureau for identifying the proper procedure in the use of savings, i.e., that savings shall be used prior to the obligation of new fiscal year monies. The problem still remains in the field: can the Bureau actually process the financial data to show that the old money will be used first prior to the use of the new money? We have seen significant problems in the fiscal year accounting of funds due to the Bureau's inability to follow the flow of funds from the contract, to the letter of credit, to the Treasury RDO disbursement of those funds.

REF: Revised 271.43 Direct and indirect costs

> The tribal organization shall be entitled to be funded for direct and indirect costs under the grant as follows:

COMMENT:

1. It is interesting to note that in the FY 83 budget request to the Congress, the Bureau has justified its request for Indian Contract Support Funds on the basis that Indian contractors are in need of funds for "overhead costs" and for the "incremental costs" of contracting Bureau programs. There is no use of the term "indirect costs." We therefore question why the Bureau proposes to make "indirect costs" available when there is no request for funds to meet the indirect costs of contractors/grantees.

2. The Bureau has been instructed by the Congress to prepare a plan and implement a system that will prevent the shortfall in Indian Contract Support Funds (ICSF) so that contractors will not fail to collect the full amount of funds required by indirect costs regulations. In March, 1982, the American Indian Law Center reported several recommendations to the Bureau, at the BIA's request, on how to deal with the indirect cost problem. The first and major recommendation is that the BIA eliminate the concept of "indirect Costs" as it may not best reflect the situation that tribal organization finds themselves in when operating programs previously operated by the Bureau. Since this was such a strong recommendation in that report, we wonder why the Bureau continues to use the terms indirect cost.

RECOMMENDATION: That the Bureau coordinate itself and publish for comment its recommendations on how the ICSF will be used and the mechanisms that will be available to tribal organizations for collecting indirect and administrative cost funds, prior to the final publications of these regulations.

REF: Revised 271.43 Direct and indirect costs

COMMENT: This revision suffers from the same mis-nomer/mis-conception as does the original regulation, 271.55, in that both section title indicate that the section will discuss indirect costs. In fact, neither the old or the new address indirect costs in any substantive manner.

We fear that the Bureau has already decided upon its recommendation that will become Bureau regulation, and that those statements have not been introduced in this published proposed rule intentionally. We forsee that when these regulations are re-published after the comment period in over, the final regs will include detailed indirect cost regulations. These regulations will not have been reviewed by the Indian public, but will nevertheless be mandatory and obliging at the same time.

RECOMMENDATIONS:

1. That the Bureau not re-publish any final version of these regulations that include substantively new language dealing with indirect costs, without first proposing those regulations for public review and comments.

2. That the Bureau consider the following suggested language in devising their regulations for indirect costs.

> (i) The Bureau will provide to tribal organizations administrative funds equal to those amounts that the Bureau would otherwise have spent on the granted program had the Bureau continued to operate this program. This amount will be determined according to the Bureau's own indirect cost rate for that program or function.

(j) Indirect costs will be made available to tribal organization either through the use of a negotiated indirect cost rate, via the tribal organization's cognizant agency; or upon the request of the tribal organization, a lump sum payment, made by the Bureau, to meet the indirect cost needs of the organization. These funds will meet the added costs of contracting, and will not take away from the administrative funds available to the organization under paragraph (i) of this section.

REF: Revised 271.44 Use of government property

COMMENT: This regulation is a slight modification of the existing regulation. However, Part 276.11, applicable under this section, indicates that Attachment N of A-102 will become the Bureau's policy document for property and the use of property.

We have serious misgivings about the use of A-102 as applied to Indian affairs. for example:

Para. 3(a) of Att. N of A-102 indicates that the requirements for real property (such as land, buildings, structures, etc.) shall "at a minimum, [shall] contain the following:

> (a) Title to real property shall vest in the recepient subject to the condition that the grantee shall use the real property for the authorized purpose of the original grant as long as needed.

We are concerned that the Bureau, in preparing these revisions, may be attempting to dump upon tribal contractors/grantees real property (i.e. buildings and structures) that are falling apart and which are in need of a great deal of repair. If this attachment is to be read literally, all grantees would assume title to federal property, and would subsequently become responsible for the maintenance and repair of such property. We are not clear that the government will provide the O & M funds to maintain these structures. And tribal organization have no independent source of income in which to maintain these structures.

At a training session in Window Rock, AZ on October 27, BIA representatives clearly stated, and circulated in a handout, that title to real property will transfer to the grantee, and confirmed that this was the intent of this regulation.

RECOMMENDATION: That the Bureau clarify its position re: the transfer of title to federal property, and clearly state the ramifications of Att. N of A-102 in this context.

REF: Revised 271.44

> (b) Requests for the use of Bureau property . . . interfere with the administration of existing Bureau programs.

COMMENT:

We present no comment on what has been revised above: we comment on what was deleted from the present regulation, 271.42, last sentence following the above clause:

> The property at the time of transfer must conform to the minimum standards established by the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651).

RECOMMENDATION:

We believe that this clause should be retained in the regulation, pending the clarification of the transfer of title of government property to tribal organizations, and the consequences that tribal organization undertake when "owning" government property.

REF: Present 271.51 Federal contracting laws and regulations

> (a) Contracts with tribal organizations under this Part shall comply with the Bureau procurement regulations contained in 41 CFR Part 14H-70, except as provided in paragraph (b) of this section.

COMMENT: We realize that once transfered to a grant mechanism, federal contracting laws will not be applicable. There will be no final recourse through the Contracts Disputes Act. However, as the Bureau states no substantive changes are being proposed in its summary comments, we must address the effect of the loss of the regulations under 41 CFR 14 H-70.

A critical loss is noted in the deletion of the availability of G.S.A. services now available under 14H-70.501 and 502. The original intention of the Act, and as mandated in Sec. 106(h) of the Act, is that tribal organizations will have made available to itself funding to meet the level of services that the Bureau would otherwise provide. Bureau schools operate and are served by the federal G.S.A. motor pool and contracts services. An independent school under a grant or contract simply cannot meet the same program needs without these services. Contract schools are implementing and fulfilling BIA educational policies of educating students on a day school basis, near their homes. The majority of Bureau schools appear to be operating dormitory programs. Yet the contract schools will suffer the most with the lost of G.S.A. services. This is significant and substantial.

We have reviewed a letter signed by Mr. Jerry Jaeger, Acting Director, OIEP, stating that G.S.A. would not provide any waivers of federal regulations to allow G.S.A. services to contractor/grantees. Mr. Ken Smith, in his testimony to the Senate Select Committee on Indian Affairs indicated that if the G.S.A. service "problem" were not corrected, these regulations would not be implemented.

BEST COPY AVAILABLE

We wonder if Mr. Smith intends to keep his word to the Congress and to Indian peoples, whom he is representing in Washington, and advocating for.

RECOMMENDATION: That the grant regs be deleted, and that revisions to the contracting regulations be started, leaving G.S.A. eligibility to contractors as permitted in 14H-70.

REF: Revised 271.51 Retrocession

> (a) Tribal governing bodies and tribal organizations may receive grants to plan, conduct and administer Bureau programs or portions thereof, and may request retrocession from any grants.

COMMENT: It is clear from this revision that substantive and critical changes are taking place in this change from contracts or grants. Although the revision is clear in its simplicity, what it omits from the present regulation is reflective of the philosophical/political change that is taking place throughout.

Present Section 271.71(a) has an additional sentence following the basic concept of retrocession, and reads:

> Rectrocession specifically recognizes the Federal Government's unique and continuing relationship with and responsbility to Indian people.

The concept is clear: the Federal Government has legal and moral responsibility to Indian peoples, and legally binding contracts, with all the protection found therein, are the appropriate mechanism for dealing with the federal government under the Act. The change to grants is as reflective of the change in relationship this Administration envisions with Indian peoples, as is the deletion of this sentence and concept from the present regulations.

RECOMMENDATION: That this sentence be added to the revised paragraph, as follows:

> (a) Tribal governing bodies and tribal organizations may receive grants to plan, conduct and administer Bureau programs or portions thereof, and may request retrocession from any grants. Retrocession specifically recognizes the Federal Government's unique and continuing relationship with and responsibility to Indian people.

REF: Revised 271.54 Reassumption

> (f) Failure to comply with terms and conditions of a grant award, which result in termination of the grant for cause, shall be considered to be gross negligence or mismanagement pursuant to paragraph (a)(3) of this section. Program responsibility for such cancelled-for-cause grants shall be reassumed by the Bureau pursuant to the provisions of this section.

COMMENT: As noted earlier, the regs lack clear statements about termination of a grant. The reference is made to OMB C. A-102, ATT. L, which indicates that termination for cause was at the discretionary decision making of a grants officer. Paragraph (f) does not clarify what the grounds are for 'termination for cause.' The suggestion that 'failure to comply with the terms of the grant' can be considered grounds for termination is very scary. Since when does the federal government and the BIA comply with all provisions of their responsibility? When are they terminated for cause? Do all BIA schools meet the demands that they are under, and are those schools terminated when they fail? Does the submission of a monthly invoice 2 days late (failure to comply with a grant requirement) mean that a school can be terminated?

RECOMMENDATION: That the BIA states in clear terms what are the termination-for-cause provisions that the Bureau will operate under, and make them a part of the regulations.

REF: Revised 271.56 Personnel for retroceeded programs

> Upon retrocession, the Bureau will assess the need for additional personnel and if necessary will seek such personnel to ensure effective program operations.

COMMENT: It appears clear that in revising the retrocession procedures and regulations, there is little intent of the present Administration to continue services to Indian peoples once required as a part of treaty obligations, that 'unique and continuing relationship' that was not included in an earlier regulation.

This regulation is so vague to be meaningless. For example:

--the bureau will assess the need for additional personnel.

If it is Bureau policy to terminate services to Indians, to get out of the education business as top level BIA personnel have indicated, then the outcomes of the assessment can be predicted: no need at all.

-- -- and if necessary, seek such personnel

It is already clear that an committment to resolve a problem is of little value; we are preparing to lose GSA services, even though we have had committments from the BIA to do something about this first!

The present regulation mandates the Bureau establish and maintain a reserve bank of positions, a 'ceiling reserve' that can be tapped to meet the needs of serving Indians under a retroceeded or reassumed program. If the positions are not there, the program will end, or be served so poorly as to warrant ending.

RECOMMENDATION: That the present regulation be continued under the grant system as a mandated responsibility.

REF: Revised 271.60 Processing of appeals

* * *

> (b)(1) No extension of time will be granted for filing notice of intent of appeal. Notice which are not timely filed will not be considered and the case will be closed and written notice to that effect will be given to the appellant.
>
> (b) [sic - should read (h)] When a Bureau official fails to act on an appeal within the prescribed time, the appellant has the right to immediately forward to the next higher Bureau official a copy of such appeal and request immediate action. This right is consecutive through the Area Director, Commissioner and/or Director of Education, to the Assistant Secretary.

COMMENT: We see a fundamental unfairness in the proposed revision. In (b)(1), no extension is available for a tribal organization to exercise its appeal rights on any decision that the BIA may make. Yet in paragraph (h), there is no loss of BIA rights should a BIA official stall and waste time, and fails to process an appeal properly. The appeal is simply bucked up to the next level.

RECOMMENDATION:

1. That (b)(1) be stricken, and (b)(2) be renumbered as (b)(1). Delete "timely" from revised (b)(2).

2. Alternatively, the Bureau could revise paragraph (h) to read as follows:

> Failure of the Bureau to process an appeal as outlined in (c) to (g) above, the decision of the Bureau official who rendered the decision which the tribal organization initially appealed will be considered null and void, and the tribal organization's application or proposal will be considered not declined.

SUBPART G Additional requirements for New School Starts and Program Expansions

COMMENT: We request that this subpart be deleted from the 25 CFR 271 regulations, and be added through publication and review in amendments to the 25 CFR 31h regulations.

This request is made because there is no sense in adding specific program type regulations to the implementing rules of PL 93-638. There is no counterpart for the restrictions placed herein for public health contracts with the Dept. of Health and Human Services. There are no such restrictions for other BIA-operated programs that are subject to Indian Self-Determination. Therefore, there should be no specific educational restrictions in these regulations.

In addition, it is fundamentally unfair for the Bureau to impose restrictions such as indicated on contract schools, whom the law supports totally and encourages, and at the same time, not be placed on Bureau operated schools. By these regulations, the Bureau can proliferate schools or expand programs, with no consideration of other schools, such as a contract school, which might be negatively affected by a new BIA school start of school expansion. There is no requirement on the BIA to give 18 months notice; yet those peoples who want to exercise self-determination are given the greatest restrictions.

RECOMMENDATION: Delete in its entirety. -Add to 25 CFR 31h amendments.

REF: Revised 271.71 Applicability

> This subpart establishes additional requirements applicable to the application and approval process for grants requested under this part for new school starts and program expansions to be funded under the Indian School Equalization Program (25 CFR Part 31h).

COMMENT:

a. We find no rhyme or reason for this section. No explanatory comments are suggested. We find no other Bureau program singled out for consideration in tribal take over. We demand to know what justification the Bureau has for isolating school starts under the Act.

b. We find that this whole section is designed to penalize Indian tribes or organizations, rather than to support self-determination. Bureau schools are not identified under this regulation. The Bureau can start a new school at its pleasure, without restraint. Indians, who should be gaining in authority and responsibility to handle Indian affairs are penalized instead.

RECOMMENDATION: That the regulation be re-written for both BIA operated and Indian operated schools.

REF: 271.72(a)

> (a) New school starts. The provision of education services by a tribally-operated school which is seeking initial funding for school operational costs for eligible Indian students not previously served under the Indian School Equalization Program.

COMMENT: It is unclear to us whether or not a school not previously operated by the Bureau will be designated a "new school start" if in fact when established, it serves students already served under ISEP. If so, it would not be regulated under this subpart. We fear that any new school will be classified a "new school start" by the Bureau in order to discourage tribal initiatives.

RECOMMENDATION: This regulation be clarified as to what will not be considered a new school start.

REF: Revised 271.72(b)

> (b) Program expansions. The expansion of existing tribally-operated school programs to provide additional educational services to age groups already being served under the Indian School Equalization Program or to serve additional age groups not previously served.

COMMENT: This regulation is so vague as to give unlimited discretionary judgement to any BIA Education Line Officer to classify any change in a school program as a program expansion.

This regulation contradicts Revised 271.42, which states in part that any savings realized by a tribal organization "may be used to provide additional services or benefits under the grant and/or expand base grant programs." We cannot in one place be allowed to do so, and elsewhere told we can't do it for another two years off!

Furthermore, there is no statutory requirement or provision that allows or authorizes the Bureau to limit a school's ability to serve its community children. Rock Point has added one year at a time for a six-year period, to establish a K-12 comprehensive school district. The children served each successive year were predominantly the same children served in the previous grade level a year earlier. There is no added costs to the formula-- these children appear to have gone to another BIA operated school if no successive school year program was available at Rock Point. We are simply keeping the children here, rather than requiring them to go to another Bureau school. This should not be regulated out of existence under the requirements of this subpart.

RECOMMENDATION: Delete this regulation in whole.

REF: 271.73(a) Service Population criteria

> (a) Service population criteria. All members of the proposed service population must qualify as eligible for services under 25 CFR 31a.4(z) and must be described in the application with sufficient detail and documentation to enable them to be classified accurately under the classification of new school starts and program expansions as set forth in S 271.72.

COMMENT: This regulation is so vague, that one would need to mind-read the Bureau to understand what information is being required. The only thing that is clear is the intent: make life so difficult that Indians will decide not to deal with the red-tape, and not take over their educational programs. Totally violates the meaning of PL 93-638.

RECOMMENDATION: Delete in its entirety; if to be revised, the revision should specify in detail the "sufficient detail and documentation" the Bureau would like. With the unlimited powers available under the revisions elsewhere, there could be no end to what the Bureau intends to request for support data.

REF: REvised 271.73 (b) Program quality criteria

(b) Program quality criteria. Proposed programs and program changes shall be of sufficient quality to offer promise of providing educational benefits to the Indian student recipients approximately equal to those provided to like numbers of recipients under other parts of the Bureau educational program funded through the Indian School Equalization Program. In determining whether this criterion is met by an application, the Director of Indian Education Programs, or his or her representative, shall consider at least the following:

(1) Whether the new school start or program expansion is likely to meet the appropriate education standards specified in Section 1121 of Pub. L. 95-561.

(2) Whether the facilities, equipment, and other supportive services of the applicant, or those incorporated in the start-up cost or temporary facilities part of the plan, will be adequate to support the program.

(3) Whether the proposed staffing is adequate to achieve the objectives of the plan.

(4) Whether the size of the student population to be served appears to be sufficiently large and stable, or increasing in numbers, to warrant initiation of a new school start or expansion of a program to serve them.

(5) Whether there is an apparent desire for the new school start or program expansion on the part of the Indian tribe and/or community to be served.

(6) Whether the start-up costs are disproportionate to the numbers of students to be served, or the potential benefits of the program, as compared with the start-up costs of other applicants.

(7) Whether there are other adequate education alternatives currently available to the students to be served by the new school start or program expansion.

COMMENT: We question the lack of clarity and detail that is suggested in the proposed regulation, as written.

a. We are told that the program shall be of "sufficient quality" in providing educational services, to the standards of at least what the Bureau offers elsewhere. In reviewing the G.A.O. reports listed earlier in these comments, we wonder at the use of other BIA-operated schools as a standard. Most tribes and communities have taken over BIA schools precisely due to the lack of quality education provided by the government. The regulation implies that the standards of BIA schools must be met in order for a grantee to operate a tribal school. Yet the intent of PL 93-638 is for tribes to "do it differently," and not duplicate the Bureau. PL 95-561, Sec. 1121(e) specifically indicates that Bureau standards will not be used as criteria for a contracted program.

b. The Bureau demands that we meet Bureau standards set by the community and appropriate educational practices and procedures for Indian children. The Bureau is promoting oppression with an implied demand that a tribal organization imitate a Bureau standard.

RECOMMENDATION: delete in whole.

REF: 271.73 (b)(1)

> (1) Whether the new school start or program expansion is likely to meet the appropriate education standards specified in Section 1121 of Publ L. 95-561.

COMMENT: This regulation specifies the intent of (b) above. We are required to meet the standards of a BIA-operated school. This is insane! This is contradictory to PL 93-638! This is contradictory to PL 95-561! And, in fact, the Bureau has been unable to publish standards for its own schools in the years that have been given them to do so! Yet we are asked to meet the undrafted/unpublished standards that incompetents cannot manage! We are asked to allow a BIA-official (already in a conflict-of-interest position) to determine the "likeliness" of a school (that will most likely take students from BIA-operated school) in meeting some undefined standards, by way of personal judgement!

RECOMMENDATION: Delete in whole this illegal provision!

REF: 271.73(b)(2) facilities

> (2) Whether the facilities, equipment, and other supportive services of the applicant, or those incorporated in the start-up cost of temporary facilities part of the plan, will be adequate to support the program.

COMMENT: Although not an implausible consideration, we would demand that an evaluation of a BIA-operated school be made in the same context, to determine if in fact BIA-operated schools meet the standards required for new-school starts under this subpart.

REF: 271.73(b)(4) size

> (4) Whether the size of the student population to be served appears to be sufficiently large and stable, or increasing in numbers, to warrant initiation of a new school start or expansion of a program to serve them.

COMMENT: Here lies a declination crtieria not support by the Act, but left to someone's judgement. And the judgement is not based on identifiable reality, but upon the "appearance" of things. And not only a population need be "sufficiently large," but also increasing in size, to merit operation by a tribe.

RECOMMENDATION: Delete in whole.

REF: Revised 273.73(b)(5) Desire

> (5) Whether there is an apparent desire for the new school start or program expansion on the part of the Indian tribe and/or community to be served.

COMMENT: The Bureau has statutory direction on what merits declination. We have now offered an additional declination criteria: a personal judgement on someone's part on whether there is an "apparent desire" for a community-operated school! The request by a community, and a tribal resolution is sufficient "appearance" to make an organization eligible for operating a new school.

RECOMMENDATION: Delete in whole.

REF: Revised 273.73(b)(6)

> (6) Whether the start-up costs are disproportionate to the numbers of students to be served, or the potential benefits of the program, as compared with the start-up costs of other applicants.

COMMENT: We are asked to give credence to some BIA official who has the power to determine the cost-benefit of a 638 school, when no other criteria are given for guidance. We are left with the judgment of someone's feelings about a new school start! This is not material for federal regulations. This is material for game-playing, for decision making by "good ol' boys" in smoke-filled back rooms!

RECOMMENDATION: Delete in its entirety.

REF: 273.73(b)(7)

> (7) Whether there are other adequate education alternative currently available to the students to be served by the new school start or program expansion.

COMMENT: "Other adequate educational alternatives" is a quality judgement best not left in the hands of an antagonist (i.e., the BIA decision maker is from the start against tribal control, and the conflict-or-interest heightens here!). If a community wishes to educate its children at home, in the community, NO OTHER SCHOOL may be adequate to the task. A neighboring BIA-operated school may be considered inadequate to the task. A neighboring public school may be inadequate to the goals and objectives of community-controlled education.

We cannot accept as declination criteria any of the "personal judgements" provided in this subpart.

RECOMMENDATION: Delete.

REF: Revised 271.75 Application procedures

COMMENT: We will all recognize the reality of the Bureau's funding cycles, the federal fiscal year, and the conjunction of all with the national school-year cycle. However, we do not find it required by statute that a notice of 18 months be given before a BIA-operated program can be contracted (remember: PL 93-638 is a contracting law!) There is no requirement for such lead times for any other BIA-operated contractable program. There is no lead time requirement under the Dept. of Health and Human Services for such lead times.

This requirement is designed to curtail and discourage Indian self-determination!

And it is not consistent with other BIA operations. The Facilities Management program has established a contingency fund to meet the M & O costs of maintaining new BIA buildings that have not been entered into the budget cycle. This separate fund provides for the costs to keep these buildings, until they are a part of the cycle. We are sure that there are other programs that have similar contingency funds. (Funds not used can always be carried over or returned to the Treasury until next cycle.)

RECOMMENDATION: That this be revised and the timeline deleted. There is sufficient timelines in the prior regulations in this part to deal with self-determination. A separate fund should be established to assume the costs of new school starts, and to meet those costs until a school can be entered into the budget cycle. If it works for other BIA/federal programs, it can be made to work for new schools.

The SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION
PHONE (208) 238-3861
(208) 238-3860

TRIBAL EDUCATION COMMITTEE
P. O. BOX 306
FORT HALL, IDAHO 83203

HEARINGS OF THE SENATE SELECT COMMITTEE
ON INDIAN AFFAIRS REGARDING
P.L. 93-638 CONTRACTS and P.L. 95-224
and related concerns

July 30, 1982

ADDITIONAL TESTIMONY
PRESENTED BY MAXINE EDMO
SHOSHONE-BANNOCK EDUCATION COMMITTEE
FORT HALL INDIAN RESERVATION
FORT HALL, IDAHO 83203
(208) 238-3861

Testimony of the Shoshone Bannock Tribes to the Senate Select Committee on Indian Affairs, Dirksen Senate Office Building, Washington, D.C. Written testimony as follow-up to oral presentation June 30, 1982.

It is our desire to present some additional testimony regarding the Bureau of Indian Affairs proposed changes in 25 C.F.R. 271 - 277 regulations implementing P.L. 93-638, Indian Self-Determination and Education Assistance Act of 1975. The BIA is proposing major substantive changes in the federal regulations affecting Indian self-Determination, by changing the relationship between the Federal Government and Indian tribes from a contract relationship to a grant relationship.

The BIA proposes to revise 25 C.F.R. 271 ff to bring the BIA into alignment with with P.L. 95-224 Federal Grants and Cooperative Agreements Act of 1978, and to increase the self-determination of Indian tribes to manage their own programs.

First let us emphasize again that P.L. 95-224 does not apply to the relationship between the Federal Government and American Indian tribes, rather it applies to the Federal Government's relationship to the states. Indian tribes are not mentioned in the language of the law and there is no evidence of legislative intent to include Indian tribes. It should also be pointed out that even within the Executive Branch of the Government there is no agreement that P.L. 95-224 applies to Indian Tribes since the Secretary of Health and Human Services is continuing to contract under section 103 of P.L. 93-638. P.L. 93-638 directs the Secretary of the Interior to contract with Indian tribal organizations. The Congress considered contracts at the passage of the act, and knowingly committed the government to contacting with Indian tribes. The BIA's proposal to apply the provisions of P.L. 95-224 is based upon an implied repeal of the contract provisions of P.L. 93-638 and judicial interpretations have not generally favored implied repeals. The relationship between Indian tribes and the Federal Government is unique, and the administration of federal responsibilities as provided under P.L. 93-638, involves special considerations not taken into account by the grant process. Substantive rights and obligations under P.L. 93-638 are being watered down if not eliminated. We agree with the BIA that the government is not buying services when contracting with tribes/organizations. We disagree strongly with the concept that government is simply providing financial assistance to the tribes in the first place. The government is obliged to provide certain services. P.L. 93-638 provided a mechanism for Indians to fulfill this federal responsibility. By proposing a grant relationship, the BIA proposes to dramatically change the relationship of trust and treaty responsibilities to that of some sort of discretionary financial assistance as defined under P.L. 95-224. It is dishonorable to change this historical relationship.

It is the position of the Shoshone Bannock Tribes, that the implementation of the grant process, under P.L. 95-224 violates the intent of P.L. 93-638 and interferes with Indian self-determination.

We believe that the proposed changes are a part of the BIA's intent to diminish federal obligations to fulfill trust and treaty responsibilities. This would appear to be a part of a greater plan to terminate services to Indian tribes. The Consolidated Tribal Grant Programe (CTGB) plans are also designed to reduce Indian initiative and are rejected by our Tribe. The BIA proposed area office realignment is also structured to fragment tribal unity.

The BIA proposes a new policy statement (271.4(h), that in any conflict between these or other regulations, the act (93-638) shall prevail. We agree with this policy statement. However, we see an immediate conflict with these proposed revisions to a grant relationship. It is in direct conflict with the Congressional mandate under P.L. 93-638 to contract for BIA programs rather than to establish a grant relationship.

The BIA proposes to utilize OMB Circulars, A-102 and A-87 as the functional administrative regulations for implementing this new relationship. P.L. 93-638 instructs the BIA to publish for review, request comments, and to consult with Indian tribes prior to amending requirements under the Act. By placing substantial authority in general federal guidelines, the BIA diminishes the unique relationship between Indians and the government. OMB circulars may be changed anytime without notice and without consultation. This effectively by-passes Indian input and responsibility for self-determination. P.L. 93-638 does not require uniformity with other federal agencies as suggested by the Bureau of Indian Affairs. This proposed change would reduce present protection and flexibility in favor of greater BIA control. Proposed changes substantially increase the authority of Bureau officials to develop grant conditions without regard to tribal wishes.

The BIA proposes to eliminate protective language that limits BIA demands for additional information or "other components" not specifically addressed in the regulations. Present regulation 271.5(c) (D) (ii) clearly states that no other compontents can be used by the BIA for declination. The revised grant regulations eliminates this clause, leaving the door wide open for the BIA to create new issues for declination. For example: some schools have been told they must comply with BIA educational standards, which P.L. 95-561 not only does not require, but clearly allows schools to establish their own standards. If the contract relationship is maintained the present regulations prescribe the clauses on which Bureau officials may insist.

The Bureau eliminates the requirements for an application under P.L. 93-638 by providing in part 276 the use of standard forms for federal assistance. Present regulations under part 271 include all details that will be required with the stipulation the "no further detail is, or shall be required." This language has been deleted. Indian contractors have had clear directions, now under proposed grant regulations, this simplicity is lost. Part 276.16 instructs applicants to use the short form for application, unless in the judgement of the grants officer "supplementary pages are required for improved program or fiscal accountability." This leaves a great deal of discretion in the hands of lower level bureaucrats who may not be exerienced in operating unique Indian programs, to demand, for example, additional information found elsewhere in the BIA system, such as in a manual or memo instruction. It is unclear if there are rights to a hearing if problems occur.

The Bureau proposes to add "special conditions" under a cooperative agreement, rev. sec. 271.23. While P.L. 95-224 allows for cooperative agreements under certain conditions, the BIA appears to have widened the scope of that provision by not indicating its obligation to prove with substantial evidence, that such special conditions do, in fact, exist. Presently, under the declination criteria, the BIA has the burden of proof. This change would further reduce a tribal initiative for self determination, wherein the government could issue a cooperative agreement, when in fact, the tribe had applied for a contract instead.

There is wide room for bureaucratic manipuilation. Again the right to appeal on a negative BIA decision is unclear.

The Bureau plans to use grants rather than contracts. The implication found between the lines of the new regulations, and in using OMB circulars for grants, is that grants under P.L. 93-638 could become discretionary. If the BIA did not have enough increased contol over self-determination initiatives, the use of the grant mechanism increases that sense of the discretionary powers. S. 271.22 gives the BIA additional power not to continue a grant that has been awarded for three years with additional review and evaluation procedures not presently allowed under the contract relationship. Continuation grants could become discretionary.

A most significant issue not addressed by the grant process, is that of administrative support/indirect costs. Under the contract mode of operation, indirect cost allocations have permitted tribes to centralize administrative support services in the following areas to provide service to all of the programs of Indian self-determinination that are serving tribal members on the reservation:

I. Financial Management & Accounting Services

II. Personnel Services

III. Property Management Services

IV. Contracting Service

V. Other Administrative Services.

This centralization has permitted a much more efficient operation and provides for better accountability of funds expended. On a project by project basis it is often difficult to identify the amount of cost involved in providing these services to the project, but it is obvious that a program cannot function without these services. For example: in FY-81 the Shoshone Bannock Tribes expended $656,712.00 for administrative support/indirect cost functions. $420,337.00 of this came from indirect cost allocations from P.L. 93-638 contracts. If this allocation is not provided through the grant process, the centralized services will have to be disorganized or eliminated. This will result in less efficient operation, less tribal control of monies expended, and less accountability. Yet the proposed grant process fails to address the issue and a clear understanding of the indirect costs of operation is clearly lacking between tribes, federal agengies, and federal officials.

The Bureau, in the written prepared testimony of Assistant Secretary Smith, states the "consultation meetings were held with tribal leaders." The Shoshone Bannock Tribe has testified that it has not been effectively consulted. Consultation becomes nothing more than a superficial notifiation of what the Bureau has already decided to do, no matter what the Indian people desire. We know of no tribe or contract school that supports this proposed change from contracts to grants. In meeting and talking with other tribal officials and school board members, the opinion is against these changes.

We ask that the committee assist the Indian people in returning the Bureau to the essentials of P.L. 93-638 and Indian Self-Determination. (Secretary Smith did not testify that Indian people wanted these changes, he argued that another act P.L. 95-224 was forcing the BIA to do so). As Secretary Smith testified, more

Indian tribes are attempting self-determination and we know the rules and what is expected. Making such a massive negative change at this time would discourage further contracting and self-determination.

We request the Committee to require of the Bureau of Indian Affairs effective consultation with Indian tribes who would be affected by these changes. Listen to our concerns and do not adopt the proposed changes as suggested by the BIA and P.L. 95-224.

We suggest that the Senate Select Committee on Indian Affairs create a working group, including members of the Indian tribes, whose responsibility will be to resolve the issues and problems related to the proposed grant process. To leave this to the BIA alone will be to perpetuate the mistakes and improprieties already made. No changes in the contract relationship should be made until this working group has resolved all issues and problems to the satisfaction of the Indian tribes.

Thank you for your concern with having these oversight hearings and for the concern of this committee for Indian education and Indian self-determination. We believe that P.L. 93-638 has been the best law for Indian people and that it continues to be the law that should determine the contracting relationship between the Federal Government and the Indian tribes.

SQUAXIN ISLAND TRIBE
SQUAXIN ISLAND TRIBE
WEST [illegible]
SHELTON, WA [illegible] 3 12

July 29, 1982

Senator William Cohen, Chairman
Select Committee on Indian Affairs
6317 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Cohen:

The Squaxin Island Tribe is submitting this statement on the oversight hearing held June 30, 1982 by the U.S. Senate Select Committee on Indian Affairs, covering:

1) The new draft regulations which amend Bureau of Indian Affairs regulations implementing P.L. 638.

2) Method for determining the secretarial level of funding for a P.L. 93 638 contract.

3) Administrative incremental or indirect cost problems associated with P.L. 93-638 contracts.

4) Problems associated with the indirect cost rate and recommendation for necessary changes.

The Squaxin Island Tribal Council lists some of our concerns and problems relating to the shift from contract to grants format as proposed by the Bureau of Indian Affairs. These include:

1) Financial discrepancies and loses.

2) Administrative and logistic entaglements at the Tribal and Federal level.

3) An uncoordinated and contradictory indirect cost system.

4) Inadequate appropriation levels.

5) Time consuming negotiations and reimbursement.

6) Auditing procedures under P.L. 93-638, which create unnecessary and unfair burdens for tribal contractors.

All have become obstacles to tribes in fullfilling the essential purposes of the law.

Proposed revisions within the B.I.A. regulation which will change P.L. 93-638 contracting to a grant process states that these changes are mandated by P.L. 95-224 (The Federal Grants and Cooperatives Agreements Act of 1977). Indian tribes are not mentioned within the language of P.L. 95-224 and there is no evidence that Congress took into account its impact on the unique considerations surrounding tribal adminstration of federal responsibilities as provided for under P.L. 93-638, which establishes a tribal right to contract for B.I.A. and I.H.S. programs and services. Section 106 (H) of P.L. 93-638 authorizes a funding level for B.I.A. and I.H.S. services under specific contracts at not less than the secretary would have otherwise provided for his direct operation of the programs.

Also of vital concern are the categories of direct and indirect costs, which to date have not been accomplished to insure that all tribal contracting activities are fully supported. Indirect cost has been given vastly different meaning and a common understanding has been clearly lacking between federal agencies, tribes and federal officials.

The Squaxin Island Tribal Council recommends that tribes retain the option of contracting under P.L. 93-638 as the most effective approach for achieving the political and cultural self-determination of our Tribe. We further recommend that Congress oppose any attempts by the Bureau of Indian Affairs to amend existing P.L. 93-638 regulations whereby the contracting option would be eliminated without the consent of the effected tribes or to amend the implemintation and administration requirements of P.L. 93-638 allowing the B.I.A. to implement P.L. 95-224 (The Federal Grants and Cooperative Agreement Act of 1977) that fails to mention indian tribes within its language.

We further recommend that the Senate Select Committee on Indian Affairs take every action available to influence the Adminstration to create a working group whose task would be the resolution of these problems related to terminology and inter-agency coordination. This effort should be conducted with the full support and involvement of O.M.B. and its deadline should be the beginning of F.Y. 1983.

A more detailed description of our concerns can be furnished to the Senate Select Committee by calling our office. (206) 426-9781

I hope the above statement and recommendation can be supported.

Thank you.

Sincerely,

David W. Whitener st.P.

David W. Whitener, Chairman
Squaxin Island Tribe

UNITED TRIBES EDUCATIONAL TECHNICAL CENTER
3315 SOUTH AIRPORT ROAD
BISMARCK, NORTH DAKOTA 58501 • PHONE 701-255-3285

July 23, 1982

Honorable Senator William S. Cohen
Chairman
United States Select Committee on
Indian Affairs
Dirksen Senate Office Bldg.
Room 1251
Washington, DC 20510

Dear Senator Cohen:

Attached, herewith, is the testimony from the United Tribes Educational Technical Center in regard to the recent hearings held on "indirect cost and contract support" for tribal organizations. We are requesting that the following statement be included for the record of such a hearing, since we were unable to personally appear the day you conducted the session.

As a contractor under P.L. 93-638 and an organization comprised and controlled by the five tribes from the State of North Dakota, we are greatly concerned about the issue of indirect costs. We believe that the guidelines for recovery of indirect costs need to be addressed and tailored to the unique needs of tribes and their respective organizations under the auspices of P.L. 93-638.

Your consideration of this statement for the record will be greatly appreciated. In the event you have questions or desire additional information, please, do not hesitate to contact me.

Sincerely,

David M. Gipp
Executive Director
U.T.E.T.C.

Enclosure

DMG:kt

United Tribes Educational Technical Center

TESTIMONY

on the Indirect Cost Problems of Contract Schools and other P.L. 93-638 Contractors

The system for determining the overhead or indirect costs of contractors providing goods and services to the Federal government was developed for use, primarily, with non-Indian, private vendors, government organizations and institutions of higher education. These organizations traditionally have resources of their "own" for both operating capital and some administrative overhead operations. Regulations developed for funding the overhead operations associated with administering Federal contracts and grants have been heavily influenced by efforts to assure that the Federal government does not end up financing overhead operations that organizations would be conducting anyway, without the Federal Income.

Indian contractors under P.L. 93-638 (especially the contract schools) have no seperate existence aside from the administration of Federal Programs for Indian peoples. Most are 100% Federally funded, have no operating capital of their "own" and no other source of administrative overhead resources other than the Federal government.

The use of regular Federal procurement procedures for P.L. 93-638 contracts with Indian tribes and organizations, in view of the fact that the purpose of P.L. 93-638 is to enable Indian persons to control their own programs, is a deviation from the normal rules and regulations. The rational behind P.L. 95-224 (the Federal

Grant and Cooperative Agreement Act) would suggest that these ought to be Grant programs for assistance to Indian people, rather than procurement operations for the benefit of the government. However, the most damaging part of these procurement procedures, for Indian contractors, is their provisions for use of Indirect Cost Rates to fund the overhead operations of the Contractor.

The problem with the Indirect Cost procedure is that the Indian Contractor will be offered an Indirect Cost rate by the Office of Inspector General based on a review of a proposal submitted by United Tribes Educational Technical Center (UTETC) or another Indian entity.

UTETC or another Indian entity is then required to try to receive the approved Indirect Cost rate from each grant or contract listed in the proposal. Federal policy, however, allows each Federal agency to decide whether it wants to pay their share. Some pay all of it. Some pay part, up to a pre-determined limit, or "subject to availability of funds". Some pay nothing, holding that their funds are appropriated only for direct services.

UTETC and other Indian entities have little or no control over these policies. They are caught between Indian people's need for such direct services and institutional need for administrative functions. UTETC has accepted funds from Federal agencies which did and did not pay their share of administrative costs under the rate. They did so in order to secure the direct services of these Federal agencies for Indian people.

This has placed UTETC and other Indian entities in the situation of a "theoretical over and under-recovery". The key concepts involved are:

"Recovery"

Contractor receipt of payment for overhead operations at the indirect cost rate set by Federal auditors, as a surcharge on the actual direct cost expended in carrying out programs.

"Under-Recovery"

The situation when contractor recovery under the rate is less than the contractor's actual allowable costs for overhead operations. Indirect cost carry-forward procedures use this situation as evidence that the rate has been set too low, and provide for adjusting it upward in a later fiscal period to compensate. It is assumed that the contractor has borrowed funds to pay for operations until compensated.

100% Federally funded contractors cannot pay interest in order to borrow the operating capital until compensated later.

"Over-Recovery"

The situation when contractor recovery under the rate is more than the contractor's actual allowable costs for overhead operations. Indirect cost carry-forward procedures use this situation as evidence that the rate has been set too high, and require adjusting it downward in a later fiscal period to compensate. It is assumed that the contractor has the over-period to provide overhead services.

If amounts over-recovered exceed amounts authorized for the new fiscal period, the contractor is obliged both to administer the program for that period, and to *pay back the surplus*.

The contractor's obligation to "recover" *all* amounts due under an indirect cost rate set by auditors creates the situation of a *theoretical* over-recovery under these procedures.

	1 Amount actually Paid by agencies	2 Immediate Debt	3 Theoretical Over-Recovery
Actual direct costs (the base to which the rate is applied)	Amount recoverable under rate established (Auditors must assume it is recovered)		
	Amount actually spent in administering the direct cost program		

1. The amount actually recovered is limited by policies of the funding agencies. It may not be known until the close of the fiscal period due to "availablity of funds" uncertainties. Commercial contractors make up the difference out of their own operating capital or profits.

2. If amount spent exceeds amount actually paid contractor by funding agencies, an immediate debt is incurred. 100% Federally funded contractors have no source of funds to overcome this debt. They cannot pay interest with Federal funds.

3. Federal auditors must hold the contractor liable for having recovered this amount (even though it was not recovered, and was not spent to administer services) under the "fairness" principle (above). They must assume it is available to administer future programs. If not needed for this purpose, it must be repaid by the contractor to the Federal government.

   While "theoretical", this is a real, enforceable long term fiscal obligation of the contractor. 100% Federally funded Indian contractors have no other means of resolving it but bankruptcy proceedings.

4. In a peculiarly perverse spin-off of these procedures, the more the contractor tries to reduce administrative costs to compensate for failure of Federal agencies to pay their share of these costs, the greater theoretical overrecovery (and future contractor debt) becomes.

This problem is not limited to UIETC alone. It is a problem being faced or about to be faced by every tribal entity in the country using indirect costs where the availibility of the non-federal resources is limited. This problem is a nation-wide problem. The degree which the problem has affected the Tribal entity will vary with the individual situation. However, it is safe to say that most Indian country is in a terrible financial bind which has been caused almost solely by the Federal Government policy on indirect costs.

The recommendations that we would like the committee to take into consideration are:

1. That the"lump sum" basis for the indirect cost be made available to Indian organizations and ask the committee's support for enabling language and funds in the FY 1983 Appropriation Act, establishing it as policy to provide this option.

2. That the Federal Government change their Federal Policy so that all Federal Agencies will pay their fair share of Administrative costs to all Indian Contractors and entities.

3. That the Federal Government change their Federal Policy to allow the indirect cost rate to be based on actual indirect cost recovery for Indian entities contracting under P.L. 93-638.

4. That the Bureau of Indian Affairs agree to pay Indian entities contracting under P.L. 93-638 the difference between theoretical and indirect cost recovery for each fiscal year. That the difference could be determined by the Office of Inspector General.

5. That the Bureau of Indian Affairs phase out the use of Indirect Costs for Indian entities contracting under P.L. 93-638. In its place, each tribal entity would apply directly to the Bureau of Indian Affairs for contract support costs on an annual basis, with no involvement with the Office of Inspector General.

○